

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-2020

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
JOSEPH JOHN BUTLER

Petitioner-Appellant

- against -

ROY F. BOMBARD
GREENHAVEN CORRECTIONAL FACILITY

Respondent-Appellee
-----X

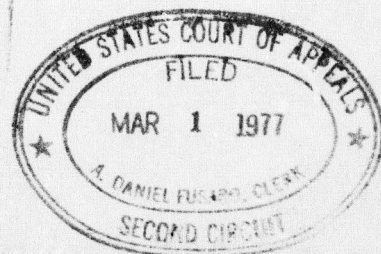
DOCKET NO. 77-2020

APPENDIX FOR PETITIONER-APPELLANT

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ROBERT E. WHITE



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APPENDIX

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OF COUNSEL:

ROBERT E. WHITE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
JOSEPH JOHN BUTLER,

Petitioner,

DOCKET NO. 76 C 1126

- against -

ROY F. BOMBARD, Greenhaven
Correctional Facility,

MEMORANDUM AND ORDER

Respondent.
----- x

PRATT, J:

By habeas corpus, 28 USC §2254, petitioner seeks to review his 1973 burglary conviction by a jury in Nassau County Court. The judgment of conviction was unanimously affirmed by both the Appellate Division, Second Department, 44 AD2d 423 (2d Dept, 1974), and the New York Court of Appeals, 36 NY2d 990 (1975).

Petitioner advances two claims in support of his request for habeas corpus relief: (1) the evidentiary rule enunciated in Knickerbocker v. People, 43 NY 177 (1870), as applied at petitioner's trial to permit an inference to arise from the recent and exclusive possession of stolen goods, failed to satisfy due process requirements; and (2) the prosecution for burglary violated his right against double jeopardy.

The matter can be disposed of without an evidentiary hearing, and, for the reasons set forth below, petitioner's request for issuance of a writ of habeas corpus is denied.

I.

On April 3, 1972 a warehouse in Nassau County was burglarized and, later that same night, petitioner was apprehended in Suffolk County with the proceeds of the burglary. On April 17, 1972 petitioner pleaded guilty in the District Court, Suffolk County, to an amended information charging him with criminal possession of stolen property and possession of a forged license. Subsequently, on November 9, 1972 the Nassau County grand jury indicted petitioner for the crimes of burglary and grand larceny. Although petitioner was successful in moving to dismiss the grand larceny count as violative of the then effective NY Penal Law §165.60(2) (person cannot be convicted of both larceny and possession of stolen property), which has since been repealed by 1976 Laws of New York Ch. 375, the Nassau Court refused to dismiss the burglary charge pursuant to NYCRL §40.20(1) since there still would be legally sufficient evidence to convict petitioner of burglary in the absence of proof of the larceny. As previously noted, petitioner went

to trial on April 24, 1973 and was found guilty of burglary.

II.

Respondent urges that this court dismiss the petition on the ground that petitioner has failed to exhaust state remedies, 28 USC §2254(b); Piccard v. Connor, 404 US 270 (1971); United States ex rel. Gibbs v. Zelker, 496 F2d 991 (CA2 1974), arguing that it is unclear whether petitioner properly preserved and raised his due process and double jeopardy claims at the trial or through appeal. Nonetheless, although petitioner may not have framed precisely the issues now raised in federal court, certainly the substance of his claims has been fully litigated in the state courts.

III.

Petitioner's due process claim is based upon the use at trial of the "Knickerbocker rule" which in essence provides that if a person is found in possession of recently stolen property for which he can give no reasonable account, a jury may conclude that he committed the theft, and if the theft were through a "burglarious taking", that he was the burglar. See Knickerbocker v. People, 43 NY 177 (1870).

There can be little doubt that participation in a theft may constitutionally be inferred from the possession of recently stolen goods. E.g., United States v. Kaylor, 491 F2d 1127 (CA2 1973); United States v. Coppola, 424 F2d 991 (CA2 1970); United States v. Carter, 522 F2d 666 (CA2 1975). Cf. Barnes v. United States, 93 Sct 2357 (1973). Petitioner's assertion that Barnes v. United States, supra, is to the contrary is without merit. In fact, the Knickerbocker case is cited by the Barnes Court as an example of permitting a conviction to be based upon an inference. 93 Sct at 2362 n.6.

While, as here, the inference was supported by such factors as petitioner's acknowledged presence in the vicinity of the warehouse, his varied and inconsistent explanations, the weight of the items taken, the manner in which the stolen items were found in petitioner's car, the discovery of a bolt cutter in petitioner's possession, 44 AD2d at 429, and petitioner's admission that he knowingly possessed stolen goods, petitioner cannot be heard to complain that the application of the Knickerbocker rule permitted his conviction to rest on grounds so tenuous as to violate his right to due process.

IV.

Petitioner's second ground for habeas corpus relief, double jeopardy, is equally without merit. Relying upon the "same transaction test" proposed in a concurring opinion in Ashe v. Swenson, 397 US 436, 448 (1970), petitioner urges that his prior conviction for possession of stolen goods precluded his conviction for burglary based on the identical incident.

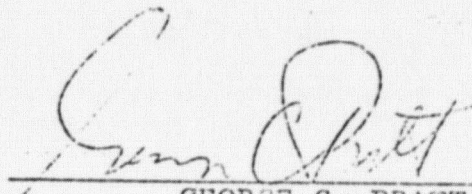
It is well established, however, that offenses are not the same merely because they arise out of the same course of criminal conduct; they are the same only when the evidence required to support a conviction upon one of the charges would have been sufficient to warrant a conviction upon the other. Blockburger v. United States, 284 US 299, 304 (1932). Accord, United States v. McCall, 489 F2d 359 (CA2 1973); United States v. Kramer, 289 F2d 909 (CA2 1961). In fact, as the Sixth Circuit recently noted, the "same transaction test", as opposed to Blockburger's "same evidence test", has never been adopted by a majority of the Supreme Court. United States v. Ganer, 529 F2d 962, 971 (CA6 1976). Because each crime charged required proof of facts which the other did not, there was no violation of the prohibition against double jeopardy.

when petitioner was tried and convicted for the burglary after he had pleaded guilty to possession of stolen goods.

Accordingly, the petition for issuance of a writ of habeas corpus is dismissed.

SO ORDERED.

Dated: Brooklyn, New York
December 8, 1976



GEORGE C. PRATT
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, ex rel :
JOSEPH JOHN BUTLER

Petitioner :

- against -

: 76-C-1126

RAY P. DOMBARD, Superintendent :
Greenhaven Correctional Facility

: NOTICE OF APPEAL

:
Respondent
-----X

S I R S :

PLEASE TAKE NOTICE that JOSEPH JOHN BUTLER, Petitioner
above-named hereby appeals to the United States Court of Appeals
for the Second Circuit from the decision and order denying him
habeas corpus relief dated and entered December 10, 1976.

Yours, etc.,

DATED: Mineola, NY
December 17, 1976

JAMES J. MC DONOUGH
Attorney for Petitioner
Attorney in Charge
Legal Aid Society of
Nassau County, NY
Criminal Division
400 County Seat Drive
Mineola, NY

TO: HON. LOUIS J. LEFKOWITZ
Attorney General
State of New York
2 World Trade Center
New York, NY

CLERK : EASTERN DISTRICT
DISTRICT ATTORNEY OF NASSAU COUNTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
JOSEPH JOHN BUTLER,

Petitioner,

DOCKET NO. 76 C 1126

- against -

SUPPLEMENTAL
MEMORANDUM AND ORDER

ROY F. BOMBARD, Superintendent,
Greenhaven Correctional Facility,

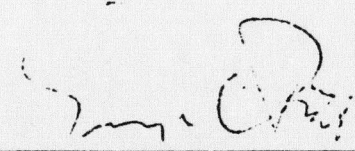
Respondent.
----- x

PRATT, J:

Petitioner's request for issuance of a
Certificate of Probable Cause to pursue his appeal of the
undersigned's memorandum and order dated December 8, 1976
which dismissed his petition for a writ of habeas corpus is
granted.

SO ORDERED.

Dated: Westbury, New York
January 4, 1977



GEORGE C. PRATT
U. S. DISTRICT JUDGE

No.

Petitioner :

ROY F. BOMBARD :
Greenhaven Correction Facility :
Respondent :

A-9

control of Respondent, the Superintendent of said institution.

III. Facts of Case

On April 3, 1972, at about 11:00 PM, relator was arrested by the Suffolk County Police for driving an automobile with a forged driver's license. Within two hours and during the course of an inventory search of relator's automobile, the Suffolk County Police learned that certain tools found in relator's automobile had been stolen during a burglary at a cemetery in adjoining Nassau County earlier that evening. While at the Suffolk County Police stationhouse immediately after his arrest, relator was interviewed by both Nassau County and Suffolk County police and relator admitted that he knew the goods were stolen property but denied taking part in the burglary. He explained to the police that in exchange for \$20.00 he had agreed to transport the tools to Suffolk County for a man named "Callahan" who had approached relator in a Nassau County diner earlier that evening complaining that his automobile had become disabled. "Callahan", a passenger in relator's automobile when initially stopped by the police, escaped and was never found by the police.

Relator was charged with criminal possession of stolen property by the Suffolk County Police and on April 10, 1972, relator pled guilty to criminal possession of stolen property and was subsequently sentenced to one year in the Suffolk County Jail.

On November 9, 1972, relator was indicted for the same incident in Nassau County and charged with burglary and grand larceny. The grand larceny charge was dismissed by the Nassau County Court on grounds of double jeopardy but the burglary charge was not.

After completely serving his sentence in Suffolk County relator was convicted after jury trial in Nassau County on April 24, 1973, of burglary and subsequently sentenced to an indeterminate sentence not to exceed five years.

At his trial in Nassau County, the so-called Knickerbocker rule was used to convict relator. After the opening statements by the district attorney, the following colloquy occurred between defense counsel and the court:

MR. WOLSTEIN: Your Honor, based upon the People's opening statement at this time and what they have said they will prove to the jury or try to prove to the jury, it is the defense's contention that under those circumstances there would not be enough evidence to go to the jury on this case from what the People have shown they intend to prove for the jury to be given the question. It is our contention, Your Honor, that this case should be dismissed on the ground that the mere fact of possession of the items is circumstantial evidence of the recent and exclusive possession of these items that were allegedly taken from this warehouse is not enough to be given to the jury.

THE COURT: That motion is Denied.

Since we have discussed this matter, I have read quite a few cases. I don't think it would serve any useful purpose to refer to all of them. I think at this point it perhaps would be sufficient if I indicated that Knickerbocker against People, 43 NYS 177, which is a burglary case, is still

good law, and it has been followed without any real variation since that time. There have been a few cases where it has been held that on the peculiar facts in those cases the inferences and presumptions from recent and exclusive possession, or, rather, the principle would not justify a conclusion that the defendant was guilty in those particular cases on the peculiar facts in each of those cases, but the principle in the Knickerbocker case is still good law, and on the facts as they have been outlined to the jury, it seems to me, there is sufficient, if shown, to make out a jury question.

Your motion is denied. You have an exception.

Later, during the Court's charge, the court made the following statement to the jury:

Now, gentlemen of the jury, we get to what you have heard considerably about, particularly during summations, and that is, what was referred to as a presumption that flows from the recent and exclusive possession of the fruits of a crime. The rule is this:

There is a rebuttable presumption that the recent and exclusive possession of the fruits of a crime, if unexplained, or falsely explained, justifies the inference of guilty. The law permits you to draw this inference, but you are not required to do so. In order for the defendant to explain recent and exclusive possession, some evidence must be elicited. The inference drawn from the presumption of recent and exclusive possession may be overcome without the defendant's testimony, and is not sustainable merely because the defendant did not take the stand. The existence of the inference in no way encroaches upon the well established right of the defendant to refrain from testifying in his own behalf. If you find that the defendant has explained the recent and exclusive possession, then the burden is on the People to prove beyond a reasonable doubt that the explanation is false. The recent and exclusive possession is not required to be proven by direct evidence. Such possession may be inferred from circumstances, but in that instance, the circumstances must be established

by clear and convincing evidence and a character, or, if true, to exclude to a moral certainty every other inference but that of recent and exclusive possession by the defendant. Of course, you are the -- you and you alone will determine whether or not the defendant had recent and exclusive possession of stolen property.

As I interpreted the opening and summation of the defendant, and the testimony here adduced, there seems to be no real question in this case that the items found in the defendant's car were stolen, and the defendant knew that they were stolen, and it was affirmatively brought out by the defendant that, in fact, the defendant pleaded guilty to criminal possession of stolen merchandise with respect to the very items that were here testified to, it would -- you would still be required, even on those facts, however, to determine whether or not this defendant had recent and exclusive possession of the stolen property before you could determine that the presumption that flows from the recent and exclusive possession applied. Keep in mind also that you would be required to determine what I have just alluded to, and, that is, that this recent and exclusive possession if you find that there was recent and exclusive possession, was either not explained or was falsely explained.

The term "recent" has its ordinary meaning, but it varies in each case, depending upon the circumstances. It is for you, members of the jury, to decide if the possession of the items found in the car was recent. The term "exclusive" means having the power or effect of excluding -- means owned, used, or controlled by one person, two persons or a group. It does not rule out such possession by two or more persons under appropriate circumstances. In other words, more than one person may have exclusive possession of the stolen property in this case. There is a tendency to think of exclusive as applying to only one person. It can apply to one person, but in ordinary language you heard the word "exclusive" used with respect to more than one person.

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For instance, you refer to an exclusive club. An exclusive club, of course, refers to more than one person. I have said that you and you alone may have the burden of determining the evidence in this case, the facts in this case. In that sense, that is your exclusive function -- not the exclusive function of one of you, but the exclusive function of 12 of you. It is in that sense that exclusive possession is used. If it is used, however, with respect to exclusive possession by more than one person, of course, you would be required to find that the defendant was one of those persons who did have exclusive possession. "Possession" means to have physical possession or otherwise to exercise dominion or control over tangible property. Before you may employ the rebuttable presumption of recent and exclusive possession of the fruits of a crime, the People must prove beyond a reasonable doubt that the defendant had recent possession, and that he alone or with another had exclusive possession of the items found in the defendant's automobile, and that those items were the fruits of a crime. In addition, you must find that the defendant has not explained, through the testimony here in this case, his possession of these stolen items, or has falsely explained it. If you so determine beyond a reasonable doubt, then you may, although you are not required to do so, apply the presumption to determine whether the presumption together with all the other testimony in this case would permit a determination that the People have proven beyond a reasonable doubt that the crime of burglary in the third degree was committed by the defendant, acting alone or in concert with others.

In this case the People ask you to draw the inference of guilt from this presumption, as I have charged it to you, that is, the presumption of recent and exclusive possession of stolen property, and on other circumstantial evidence.

Subsequent to the above burglary conviction, relator has been convicted of another felony and because of the above burglary conviction he has been sentenced under New York State's Prior Felony Offender statute which mandates harsher punishment for such offenders.

IV. Claims

Relator contends he was denied due process of law because the Knickerbocker rule dealing with the presumption that arises from recent and exclusive possession of stolen goods was used to convict him and that rule as it applies to burglary does not satisfy due process requirements.

Relator further contends that his prosecution by Nassau County for burglary violated his right not to be twice placed in jeopardy of life or limb.

V. Exhaustion

Relator has exhausted all available state remedies by appealing his conviction to the Appellate Division for the Second Department which affirmed the conviction with opinion (44 AD 2d 423) and by appealing to the New York Court of Appeals which affirmed the judgment without opinion, (36 NY 2d 990). A copy of the Appellate Division's decision and a copy of the Court of Appeal's decision are attached.

The issues raised in the present application have been raised in the New York courts. No previous petition for a writ of habeas corpus has been made to this or any other court.

WHEREFORE, petitioner requests:

1. A writ of habeas corpus be directed towards respondent requiring him to appear and answer the allegations.
2. Relator be relieved of the unconstitutional conviction and be discharged from custody on that charge.

3. Relator be allowed such other and further relief as this Court deems just and proper.

Robert E. White

Sworn to before me this

day of , 1976

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA ex rel
JOSEPH JOHN BUTLER,

Petitioner,

-against-

ROY F. BOMBARD Superintendent, Greenhaven
Correctional Facility,

Respondent
-----X

VERIFIED ANSWER

76 -C-1126

W. RUSSELL CORKER, an Assistant District Attorney in and
for the County of Nassau, states:

1. This answer is filed in response to an order, issued
by the Hon. Walter Bruchhausen, U.S.D.J., on June 17, 1976,
directing respondent to show cause why an order should not be
entered directing that a writ of habeas corpus issue.

2. For the reasons fully set forth in respondent's
accompanying memorandum of law, the writ should not issue.

WHEREFORE, respondent requests an order dismissing
the petition.

.....

W. RUSSELL CORKER

STATE OF NEW YORK)
COUNTY OF NASSAU)ss.:

W. RUSSELL CORKER, being duly sworn, deposes and says:

That he is the attorney for respondent herein, that he has read the foregoing answer and knows the contents thereof, that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

This verification is made by the attorney and not by respondent himself because all of the material allegations of the petition are within his personal knowledge.

.....

W. RUSSELL CORKER

Sworn to before me this
day of September, 1976

.....

6-13-53
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA ex rel
JOSEPH JOHN BUTLER,

Petitioner

-against-

ROY F. BOMBARD Superintendent, Greenhaven
Correctional Facility,

76 -C-1126

Respondent
-----X

RESPONDENT'S MEMORANDUM OF LAW

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District Attorney, Nassau County
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(516) 535-4800

William C. Donnino
W. Russell Corker

Of Counsel

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA ex rel
JOSEPH JOHN BUTLER,

Petitioner

-against-

ROY F. BOMBARD Superintendent, Greenhaven
Correctional Facility,

76 -C-1126

Respondent
-----X

PRELIMINARY STATEMENT

This is an action for a writ of habeas corpus pursuant to 28 U.S.C. §2254. An order to show cause why the requested relief should not be granted was issued by Judge Bruchhausen on June 17, 1976.

Petitioner's writ challenges a judgment of the County Court, Nassau County, rendered June 1, 1973, convicting him of burglary in the third degree, and sentencing him to a term of imprisonment of up to five years.

The judgment of conviction was unanimously affirmed, with an opinion, by the Supreme Court of the State of New York, Appellate Division, Second Department (44 A.D.2d 906).

The order of the Appellate Division, Second Department which affirmed the judgment of conviction was unanimously affirmed, without an opinion, by the Court of Appeals of the State of New York (36 N.Y.2d 990).

Pursuant to an agreement with the Office of the Attorney General of the State of New York, the District Attorney of Nassau County will appear and represent the named respondent in the instant proceeding.

The Crime

The facts, as found by the Appellate Division, 44 A.D.2d 423,424-425, are as follows:

The defendant was stopped for speeding on April 3, 1972 at approximately 11:00 P.M. near Hauppauge in Suffolk County. Upon examination, it appeared to the police officer that the license proffered by the defendant was forged. This was confirmed by a radio check and the defendant was forthwith placed under arrest for possessing a forged driver's license. The officer had noticed that the vehicle was very low to the ground and closer inspection after the arrest disclosed several large tool boxes on the rear seat. After receiving the Miranda warnings, the defendant told the officer, first, that he did not know to whom the tools belonged, and then, that he thought they belonged to an unidentified passenger whom the officer had seen fleeing from the vehicle after it stopped. Taken to police headquarters, the defendant was again questioned by police and his vehicle was impounded. The Suffolk County Police regulations required an inventory of the contents of the impounded vehicle. Until this point, the police were unaware of any burglary.

At the police station, it took several police officers approximately two hours to empty the vehicle of its contents and to prepare an inventory. They removed seven large tool boxes from the rear seat and a battery charger and a wheel balancer from the trunk. The tool boxes were stacked to within eight inches of the roof and obscured a driver's view through the rear window. Three of the tool boxes weighed about 250 pounds each, one about 150 pounds and two others about 50 pounds each. The police found a name, address and telephone number

in one of the tool boxes. Subsequent inquiry disclosed that the person whose name was in the box was its owner; that he worked at Holy Rood Cemetery at Westbury in Nassau County; that he had left the tool box in a tool shed at the cemetery at 5:30 that afternoon; and that sometime later the cemetery gate was forced open and the tool shed burglarized and seven tool boxes, a battery charger and a wheel balancer were taken from the shed. These were the articles found in the defendant's vehicle. The defendant did not deny being in possession of stolen property but did deny that he was the burglar.

The defendant told the police at the police station, after again receiving the Miranda warnings, that he had been in Westbury earlier in the evening, had stopped at a diner for coffee and there met a man who offered him money to transport both him and the tools to an undisclosed place in Suffolk County. The defendant at first stated he did not know the man's name, but later remembered that his name was Callahan and that he resided in Nassau County. In one version, the defendant told the police that this man was an old friend whom he had known in prior years when he resided in the Westbury area. The defendant also told the police that he had agreed to transport the man and the tools to Suffolk County, that the two of them transferred the tools from the man's vehicle to his own and that they thereupon left the man's allegedly disabled vehicle in the diner's parking lot. The defendant told one officer that he knew that the tools were "hot".

Police investigation failed to uncover either a man named Callahan residing in the Westbury area who owned an automobile which fit the description of that given by the defendant or the automobile itself parked where the defendant stated he had last seen it. The man seen leaving the scene of the defendant's arrest, despite an immediate police search, was not found.

POINT I.

PETITIONER WAS NOT PLACED TWICE IN
JEOPARDY

(Answering petitioner's Point II)

Introduction

On April 3, 1972, the warehouse of the Holy Rood Cemetery, located in Nassau County, was burglarized. Petitioner was apprehended later that same night in Suffolk County with the proceeds of the burglary. The following day, April 4, 1972, petitioner was charged in Suffolk County with the crimes of criminal possession of stolen property in the second degree and possession of a forged instrument. On April 17, 1972, petitioner pleaded guilty (Copertino, J.) in the District Court, Suffolk County to the amended information charging him with Criminal Possession of Stolen Property in the Third Degree, and Possession of a Forged License, (Minutes of Trial, pp. 290-291, 294-295, 300-301).

Subsequently, on August 17, 1972, petitioner was arraigned in Nassau County District Court for the burglary. On November 9, 1972, the Nassau County Grand Jury indicted him for the crimes of burglary in the third degree and grand larceny in the second degree. On December 13, 1972, petitioner moved to dismiss the indictment. On February 21, 1973, the court granted petitioner's motion to dismiss the grand larceny count. Petitioner went to trial on April 24, 1973, and was found guilty of burglary in the third degree.

No exhaustion of state remedies

Petitioner now maintains that his right to be protected from double jeopardy, pursuant to the Fifth Amendment to the United States Constitution, has been violated by his trial and conviction in Nassau County. In suport of his argument, petitioner urges the adoption of the "same transaction" test suggested in Justice Brennan's concurring opinion in Ashe v. Swenson, 397 U.S. 436 (1970).

First, petitioner did not raise the constitutional claim now advanced, that is, the "same transaction" test at trial or in the Appellate Division. It was not until petitioner's appeal to the New York Court of Appeals from the Appellate Division's order that the instant claim was first presented, and under New York law the failure to have presented the claim before reaching the Court of Appeals could preclude the Court of Appeals from jurisdiction to review the claim. CPL §470.35.

As previously noted, prior to the commencement of trial defense counsel made a motion to dismiss the indictment. In particular, counsel first moved to dismiss the grand larceny count under Criminal Procedure Law §40.20 on the ground that since defendant had been previously convicted of

criminal possession of stolen property in Suffolk County and since, under Penal Law §165.60 (2) a person may not be convicted of both larceny and possession stolen property, the grand larceny count had to be dismissed. [Penal Law §165.60 (2) 1976 Laws of New York Chapter 375 .] The People consented to the dismissal of that count on the grounds of the prohibition then set forth in Penal Law §165.60 (2). The court granted that portion of the motion.

Counsel next moved for an order to dismiss the burglary count on the ground that if the larceny count were dismissed, the burglary count must also fall because there would be legally insufficient evidence to convict defendant of burglary in the absence of proof of the larceny. Counsel cited once again CPL §40.20 (1) for the proposition that defendant could not be twice prosecuted for the same offense. The trial court denied defendant's motion to dismiss the charge of burglary, stating that the absence of the larceny count did not mandate a dismissal of the burglary charge. The court found that the indictment was legally sufficient.

It is apparent from the foregoing that at no time in its motion to dismiss did defense counsel ever raise a challenge to the indictment either under CPL §40.40, (the applicable New York law concerning repeated prosecutions for different and factually distinct offenses arising out of the same criminal transaction) or under Mr. Justice Brennan's constitutional theory presented in Ashe. Instead, the challenge

addressed to a claim of double jeopardy per the traditional "same offense" standard under CPL §40.20 (1) and to an allegation to whether substantively the crime of burglary could be made out without the charge of larceny.

Thus, in the absence of a motion to dismiss pursuant to CPL §40.40 or Ashe, petitioner waived such objection on appeal. CPL 470.35 . Criminal Procedure Law §470.05 clearly provides that for purposes of appeal, a question of law with respect to a ruling is presented when a protest thereto was registered at the proceedings below. The absence of a timely challenge acts as a waiver thereof. In view of counsel's failure to move to dismiss the burglary charge under §40.40, the court was unable to rule on that issue. Indeed, petitioner did not raise the issue here presented until the Court of Appeals. In affirming, without opinion, it can not, in reason or in law, be argued that the Court of Appeals passed on the merits of the claim presented for the first time in that tribunal, and not raised in the Appellate Division or at nisi prius. Accordingly, petitioner's habeas corpus claim was never properly raised before the state courts and, therefore, petitioner has failed to exhaust his state remedies. 28 U.S.C.A. §2254 (b); Piccard v. Connor, supra; United States ex rel. Gibbs v. Zelker, 496 F. 2d 991 (2d Cir. 1974). In any event, petitioner is wrong on the merits.

Petitioner was not twice prosecuted for the "same offense".

In order to support a claim of a violation of double jeopardy under the federal constitution it must be shown that the offenses charged were in law and fact the "same offense". United States v. McCall, 489 F. 2d 359 (2d Cir. 1973). It is well established that offenses are not the same merely because they arise out of the same course of criminal conduct; "they are the same only when the evidence required to support a conviction upon one of them [the indictments] would have been sufficient to warrant a conviction upon the other". Blockburger v. United States, 284 U.S. 299 (1932); United States v. Kramer, 289 F. 2d 909, 913 (2d Cir. 1961). The "same transaction" test, proposed by Justice Brennan in Ashe v. Swenson, 397 U.S. 436, 448 (1970), and urged upon this Court by petitioner, has never been adopted by a majority of the Supreme Court. The Second Circuit has followed the rule enunciated in Blockburger throughout the years and as recently as 1976, in United States v. Ganer, 529 F. 2d 962, 971 (2d Cir. 1971), reaffirmed the Blockburger ("same evidence") test.

Petitioner does not suggest, as well he could not, that burglary and possessing stolen property are the "same offense"; the elements of each crime are distinguishable, each requiring proof of a fact which the other does not. Cf. Blockburger v. United States, supra, at 304.

Because each crime charged required proof of facts which the other did not, and because each crime was committed in separate jurisdictions precluded by State law from prosecuting the offense not committed within its geographical jurisdiction (CPL art. 20), there was no violation of the prohibition against double jeopardy in this case.

POINT IITHE KNICKERBOCKER RULE, UTILIZED IN THE
CHARGE TO THE JURY, IS CONSONANT WITH THE
STRICTURES OF DUE PROCESS
(Answering Petitioner's Point I)

Petitioner was convicted of burglary in the third degree (New York Penal Law §140.20). This conviction concededly rested in part upon an application of the rule established by the New York Court of Appeals in Knickerbocker v. People, 43 N.Y. 177 (1870), which in essence provides that if a person is found in possession of recently stolen property of which he can give no reasonable account, a jury may conclude that he committed the theft, and if the theft were through a "burglarious taking", that he was the burglar.

In the instant petition for habeas corpus, petitioner argues that, while possession of property recently stolen may justify an inference that the possessor of the stolen property knew they were stolen, recent possession affords no support for an inference that he committed the burglary. Accordingly, petitioner argues, the Knickerbocker rule as applied to burglaries fails to meet due process requirements. Petitioner's argument lacks merit.

Initially, petitioner failed to take any exception to the specific portion of the trial court's charge to the jury here complained of. Thus, the charge point was not properly preserved for review upon a collateral attack. Rule 30, Fed. R. Crim. P. Second, petitioner's habeas corpus claim was never raised before the state courts .

A review of the claim presented to the state courts reveal that at no time did petitioner raise the constitutionality claim now urged in the instant habeas corpus petition, but, merely, argued the application of the Knickerbocker rule to the facts of the case. People v. Butler, 44 A.D.2d 423 (2d Dept. 1974), affd, 36 N.Y.2d 990 (1975). Thus, petitioner has failed to exhaust his state remedies. 28 U.S.C.A. §2254; Picard v. Connor, 404 U.S. 270 (1971); Daneff v. Henderson, 501 F. 2d 1180 (2d Cir. 1974). Indeed, if petitioner would have raised the instant issue on appeal, the Court, no doubt, would have found that the challenge had been waived by a failure to object or take exception to the complained of charge at nisi prius. See, CPL§470.05. In any event, petitioner is wrong on the merits.

The trial court's instruction here challenged states a permissible inference, the constitutionality of which must be tested under standards delineated by the Supreme Court. An inference will be rejected as violative of due process "unless it can at least be said with substantial assurance that the presumed fact is 'more likely than not' to flow from the proved fact on which it is made to depend." Leary v. United States, 395 U.S. 9, 36 (1969). Whether the inference must also satisfy the "beyond a reasonable doubt" test established in In re Winship, 397 U. S. 358, 364 (1970), is a question yet to be decided in the area of presumptions and inferences. See,

Barnes v. United States, 412 U.S. 837, 841-46 (1973); Turner v. United States, 396 U.S. 398, 416, 419 (1970); Leary v. United States, supra, at 36, n. 64. But, under the most stringent formulation of the test, (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) the here challenged inference accords with due process. Cf. Barnes v. United States, supra, at 2362.

The argument, possession of recently stolen property can not constitutionally give rise to an inference that the possessor participated in the burglary, while often advanced, has always been rejected by any jurisdiction confronted with the issue. Thus, as early as 1913, in McNamara v. Henkel, 226 U.S. 520, 524-525 (1913), the Supreme Court recognized that possession of recently stolen goods supports an inference not merely of guilty knowledge, but of participation in the theft.* As has often been noted, instructions identical to the one employed in the instant case do no more than accord the evidence its natural probative force,"that is, it is merely an articulation of a reasoning process which the jury may legitimately employ to identify the person who committed an offense. "McNamara v. Henkel, supra, at 525.

* In support of this proposition, the Court cited, inter alia, People v. Knickerbocker, supra.

Indeed, possession of recently stolen goods as supporting an inference that the possessor was the burglar is the prevailing rule in the Second Circuit, its application being recently endorsed in United States v. Coppola, 424 F. 2d 991, 993 (2d Cir. 1970)- (Where the Court rejected the identical argument now pressed on this Court); accord, United States v. DeSisto, 329 F. 2d (2d Cir. 1964); United States v. Keylor, 491 F. 2d 1127, 1131 (2d Cir. 1973); United States v. Barlow, 470 F. 2d 1245, 1254 (D. C. Cir. 1972); United States v. Fench, 470 F. 2d 1234 (D. C. Cir. 1972); See also, Devit and Blackman, Federal Jury Practice and Instructions, §13.12 (2d ed. 1970, Supp. 1974)-- where a charge similar to the one here challenged is approved.

Moreover, the instant case was a proper one for drawing the inference that petitioner actually participated in the burglary. Indeed, the Appellate Division, in affirming petitioner's conviction, supra, at 429, noted that the facts fairly compel the conclusion that petitioner was one of the thieves. Particularly, the weight of the items taken, petitioner's apprehension with the stolen items in his possession several hours after the commission of the crime, several miles from the scene of the theft; his acknowledged presence in the vicinity of the crime scene earlier that evening, and petitioner's several varied and inconsistent stories, was clearly sufficient to enable the jury to find beyond a reasonable

doubt that petitioner participated in the burglary. Since the inference thus satisfies the reasonable doubt standard, the most stringent standard the Supreme Court has applied in judging permissive criminal law inferences, it satisfies the requirements of due process.

STATEMENT OF FACTS

COMBINED HUNTLEY / SEARCH AND SEIZURE HEARING

SERGEANT JOHN J. HORAN testified that on April 3, 1972 he was a member of the Suffolk County Police Department and was working a tour of duty that night, accompanied by a brother officer (3-4)*. At approximately 11:00 P.M., while stopped at an intersection, he observed a speeding automobile, driven by Mr. Butler, which was very low to the ground, as if its springs were broken (4). The car was going about 70 miles per hour in a 55 mile zone (30). Horan turned on the light and siren, pulling up directly behind the speeding car which turned off the highway into a diner approximately one mile from the intersection (5, 26). The car was not forced off the road, but was responding to the police car's light (26). Horan parked behind Butler (26).

Immediately after stopping, the sole passenger in the car with Butler proceeded rapidly into the bathroom of the diner (9, 31). As the police approached on foot, Butler was in the process of getting out of the car and upon request produced an operator's license and a car registration (6, 27, 28, 32). The registration corresponded to the car (33). The license was in the name of "James Brooks" (6). Horan asked Butler who owned the car; Butler replied that it was his girlfriend's (37).

The license appeared to Horan to be a forgery for a variety of reasons - improper type, numbers out of sequence, and wrong

*numbers in parenthesis refer to minutes of hearing

first letter (7). Horan testified that the first letter of the license number should have been a "B" but was a "C" instead (187-188). After radioing for and receiving confirmation from Albany that the license was invalid, Butler was arrested for possession of a forged instrument (7, 36). After being read the Miranda warnings Butler stated that he was willing to talk to the police without a lawyer (7-8). Butler was not asked at the scene what his real name was (37).

Sergeant Horan testified that he noticed seven large tool boxes in the back seat of the car, and questioned Butler as to their ownership (8, 37-38). According to Horan's testimony Butler replied that he did not know who the owner was (8, 38). Memory refreshed, Horan testified that Butler did say that he thought the tools belonged to the passenger who had gone into the diner (40-41). Butler never claimed that the tools were his (41). Horan appeared confused as to whether this conversation occurred at the scene, at the third squad detectives or at both places (41, 42). Horan proceeded into the diner to search for the passenger, but by that time he had escaped through a window in the bathroom (9, 42-43). K-Nine was called to search the area, but the passenger was not found (43).

Horan testified that Butler told him that he did not know or recall the passenger's name (44, 62-64). Horan did remember that Butler spoke quite freely about how he came into possession of the tools (50) and told him he had met the passenger in a Nassau County diner and the passenger told him his car had broken down and asked Butler if he would transport himself and his tools to Suffolk County (44-45). Butler was to be paid \$20 for this (45-45, 63).

Again, Sergeant Horan could not recall if this conversation occurred at the scene or at the Third Squad (46).

Although unable to recall if any box was opened or an investigation of the tools in the back seat was conducted, Horan did testify that any search made on the scene was visual only (47).

After the arrest, Horan drove Butler to the Third Precinct while his partner drove Butler's car (9). Upon arrival, Butler was booked, processed, and turned over to Detective Gozaloff (47-48). The owner of the car was contacted by police and stated that the car had been loaned to Butler (20, 53). Horan left to remove and inventory the articles in the car (48). Sergeant Horan testified that the police knew the car was not Butler's prior to removing the tools (21). There were about nine other detectives besides Horan working to unload the car (48). Horan testified that at the time of removal he had no knowledge the goods were proceeds of a burglary (50).

The first of the tool boxes removed was opened "[f]or identification purposes to find out who owned the tools" and a name and address was found therein on a piece of paper (9, 10, 17, 18, 19-20). This person was contacted about midnight, approximately one hour after appellant's car was stopped, and the owner was asked "if he gave anyone permission to have the tools with them (10). He denied giving anyone permission to have the tools, and he further stated he would return to the place where he worked (Holy Rood Cemetery in Nassau County) to see if they had been stolen (10). He called the police 45 minutes later to confirm that his tools were missing and the cemetery broken into (10, 52).

Sergeant Horan testified that an inventory was conducted, lasting until 3:00 A.M., pursuant to Suffolk County Police Department rules and regulations (11,51) and the purpose for inventorying was to comply with those regulations. Horan identified seven photographs as being a fair and accurate representation of the condition of the articles inventoried (12). Horan testified that seven tool boxes, tools in a garbage can, bolt cutters, and two clocks were taken from the back seat, and a battery charger and wheel balancer were taken from the trunk (12-16). An empty bottle of liquor was also removed, but no photograph was taken of it (50-51). The articles had not been re-arranged or touched prior to their removal at the station (14). Some of the articles had the words "Holy Rood Cemetery" on them, although this was not discovered until after the tools were taken out of the car (18). The tools had been piled six to eight inches from the car roof -- so high, according to Sergeant Horan, as to prevent a driver from seeing out of the rear-view mirror (15). Some of the tool boxes took three to four detectives to carry, and one article weighed three to four hundred pounds (56-57). The two largest boxes contained seven tiers of drawers, and both boxes were fairly full of tools (58). Horan did not think one man could carry either box alone (58). Upon removal from the vehicle the articles were not inventoried as Mr. Butler's property, but "unknown", the procedure followed under department rules "until we find out if we have a proper owner" (50).

The Court evidenced its concern as to when Horan first believed the goods to be stolen:

THE COURT: You didn't have any reason to believe that these were stolen items until after you had taken them out of the car, is that it?

THE WITNESS: Yes, and his statement that he did not know who the owner of the tools was (19) (emphasis added)

The Court was apparently not content with this answer and immediately put a similar question to Horan again, this time receiving a more satisfactory reply:

THE COURT: I understand that, but did you have any reason to believe that these were stolen items until after you had spoken to the owner?

THE WITNESS: No. (19).

Later in his testimony, Sergeant Horan testified that upon noticing names not corresponding to Butler's on the tools, he had occasion to suspect they might be the fruits of a burglary (54)

Finally, Horan stated that at the time of arrest, he was "mainly concerned with the forged license and the possibility that these things were not actually Mr. Butler's." (66) (emphasis added).

DETECTIVE GERARD GOZALOFF testified that on April 3, 1972 he was a member of the Third Squad Detectives, Suffolk County Police Department (96). Gozaloff testified that Butler was brought into the Third Squad office about 11:15 P.M. and was turned over to him around 11:30 P.M. (98).

Prior to beginning interrogation Gozaloff conversed with Patrolman Horan and accompanied him outside to look at the tools in the car (104). Telephone calls were made to the tools'

owners (100). Gozaloff testified that he did not start to question Butler until he found out the true ownership of the tools and that they were missing from the cemetery (100, 108).

Butler denied taking part in any burglary (99, 109) and told Gozaloff that he had met someone in Mineola, his passenger, who asked him to transport the goods to Suffolk County for him (99, 109). He was to be paid for doing it, although he did not tell Gozaloff the exact amount (106, 115). Butler also stated that he knew that the goods were "hot" (99). Butler told Gozaloff that the man was an old acquaintance, but Butler did not know his name (99, 100).

The questioning by Gozaloff continued for 15 to 20 minutes, ending around 11:50 P.M., and Butler was then placed in detention (102). Throughout the questioning, Butler's story remained consistent and although he refused to sign any statements, he voluntarily talked with Gozaloff (110, 113).

Gozaloff testified that the vehicle was not unloaded until after his conversation with Butler and he stated that he personally helped to unload (104, 108, 103). Gozaloff and another policeman succeeded in lifting one of the two large tool boxes off the ground, Gozaloff's end weighing over 125 to 150 pounds (103); it took 4 to 5 people to lift it out of the car, however (103-104).

Detective Gozaloff testified that Butler did not appear to be intoxicated nor was there any odor of alcohol about him (109).

DETECTIVE JOHN LEAHY testified that on April 3, 1972, as a member of the Nassau County Police Department, he was notified by Detective Gozaloff at 11:20 P.M. of a possible burglary in Nassau County (78). Leahy proceeded to the scene of the burglary, arriving about midnight (81), and from there went to the Third Squad of the Suffolk County Police Department, arriving there at approximately 1:15 A.M. (68-69; 84).

After being read the Miranda warnings and having been told of the cemetery break-in, Butler denied having had anything to do with the burglary and readily explained how the tools came to be in the car (86). Butler told Leahy that after drinking earlier in the evening, in the Westbury area, he had gone to a diner, and there, around 9:00 P.M., met a person he had known for some years past while living in the Westbury area (72). Although unable to recall exactly, Butler thought the person's name was either Steve or Carl Callahan (72, 76, 85). Butler did not know where the individual lived (77). "Callahan" told Butler that his car had broken down and offered him \$50 to transport some merchandise to Suffolk County (72). Detective Leahy further testified that Butler told him "Callahan's" car was a 1962-1964 red Pontiac convertible and that, thereupon, he contacted Nassau County Police Department and requested that a car be dispatched to search for the car (72-73, 86-87). Approximately fifteen minutes later, Nassau County Police Department, responded that a search of the immediate vicinity of the diner proved fruitless (73, 87, 91).

Upon receiving the response from the Nassau County Police Department, Leahy went back to Butler and called him a liar;

thereupon, Butler refused to converse with Leahy any further about the burglary (88-90). Butler indicated that if Leahy did not believe what he was saying, he did not want to talk to him anymore (91-92).

Detective Leahy testified that during their conversation Butler had told him that his girlfriend owned the car and had given him permission to use it. Leahy testified that he knew this information had been verified by the Suffolk County Police Department.

Detective Leahy also testified that he had seen the tools while they were in the squad room of the Third Squad, Suffolk County Police Department and had attempted to lift one of the two large boxes, but was only able to lift one end (74-75).

Detective Leahy further testified that Butler, although having an odor of alcohol about him, did not appear to be intoxicated.

FINDING

THE COURT: On April 3, 1972, Sergeant John J. Horan, who was in a police vehicle with Officer Vincent Valacca, at about 11:00 P.M., saw the defendant driving a 1961 Oldsmobile south-bound on Route 111. In the passenger seat there was another individual. The automobile was proceeding at a high rate of speed, exceeding the speed limit of 55 miles an hour. The car itself was depressed, that is, the springs were depressed so that it appeared to be very heavily laden.

A chase ensued at about 70 miles an hour, with the police car using its flashing light. The car was stopped

or came to a stop at the Pyramid Diner on Route 111. When the car came to a stop, the individual in the passenger seat left the defendant's car and proceeded rapidly into the diner. It developed that this individual went into the men's room, kicked out the window and disappeared. He was not apprehended.

The defendant was in the process of leaving the motor vehicle when the two police officers arrived. He was asked for his license and registration. He produced a registration made out to a Carol Armstrong and a license which, in the opinion of the police officer, was forged. The numbers on the license were out of sequence, a home typewriter had been used rather than the IBM typewriter or machine used for regular use for licenses. There were other indications that made it apparent to the police officer that the license was forged.

A radio inquiry was then made by the police officers, as a result of which the officers came to the conclusion that there was no such operator's license. The defendant was thereupon arrested for possession of a forged instrument.

Sergeant Moran then read to the defendant the four-fold Miranda warnings. The defendant stated that in effect he waived his right to remain silent, and that he did not wish to consult with an attorney.

Standing from a point outside of the automobile, Detective Moran was able to see that the back seat was loaded with tool boxes, seven boxes. These boxes were all loaded on the back seat and came within six to eight inches of the top of the car. The defendant was asked whether he knew to whom the tools belonged. At that time, he stated that he did not know the name of his companion, that he met him at a Nassau diner on Jericho Turnpike, and that he did not know to whom the tools belonged. Other information was given by the defendant, that is, that he understood that the items in the car belonged to the companion and that at this diner on Jericho Turnpike he met this individual, who offered him about \$20 to transport the tools from Nassau County to Suffolk County, that this individual's car had broken down, that he was, therefore, unable to do it himself. He further said that thereafter the items were all transferred from his companion's car to the car that the defendant was driving, that he was in the process of driving to the place where the tools were to be delivered, an address he himself was not acquainted with when he was apprehended by the police.

The Armstrong car was driven by one of the police officers to the Third Squad Detectives in Suffolk County, where, in accordance with the rules and regulations of the Suffolk

County Police Department, an inventory was taken of its contents. The inventory is reflected in People's Exhibits 1 through 7, and in addition thereto, People's Exhibit 10.

People's Exhibit 10 was taken from the car. Of the items shown on People's Exhibits 1 through 7, only the battery charger and the wheel balancing machine was taken from the trunk. The trunk itself was not locked, although it was fastened in some manner so that it wouldn't spring open.

At the police station, the officer, John Leahy, at about 1:00 a.m. on April 4th, interviewed the defendant. The Miranda warnings were read to him. He waived his rights and responded to questions. At this time he stated that he had been drinking in Westbury on April 3rd at about 6:00 p.m., at which time he met an old acquaintance from Westbury, "Carl" or "Steve," whose last name was possibly "Callahan." The defendant stated that he met this individual later at a diner at Jericho Turnpike and Glen Cove in Mineola, that this individual told him that his car had broken down, that he was transporting merchandise to Suffolk County, and asked the defendant whether he wouldn't perform that operation for about \$50. "Carl" or "Steve" was then driving a red Pontiac convertible of early or middle '60s vintage. The defendant stated that the car that he was driving

and that belonged to Carol Armstrong was his girl friend's car and that he had permission to use it. This latter fact was verified by the police officers.

An examination of the parking lots and the general area of the diner at Jericho Turnpike and Glen Cove Road was made by the police and no red Pontiac convertible matching the description was found. In fact, there were no cars at the place. The diner was closed.

Detective Gozaloff, now with the Homicide Squad in Suffolk County and then with the Third Squad Detectives, saw the defendant about 11:15 p.m. at the police station. Detective Gozaloff spoke to Officer Moran before speaking to the defendant. He was advised again of his Miranda rights. The defendant stated he understood and waived the rights. He said that he did not want to speak to a lawyer at that point.

The defendant was asked whether he had broken into the Holy Rood Cemetery. The defendant insisted that he did not commit the burglary, and he told essentially the same story that was told to Detective Leahy and Detective Moran, with some variations. He told Detective Gozaloff that he did not know the name of his companion, that he knew that the boxes were hot, but that he had agreed to take the boxes to Suffolk County for some unstipulated amount. He was asked

to give a written statement and refused to do that. That interrogation was finished at about 11:15.

The contents of the automobiles were unloaded at the Third Squad. The items in the tool boxes were extremely heavy, requiring several men to lift them and take them out of the car. Neither Sergeant Moran or Detective Leahy were able to lift the heavy items by themselves or when aided by one other officer.

A telephone call was made to the owner of the tools, whose address was found in one of the tool boxes. After an examination, the owner reported back that his tools were missing from the Holy Rood Cemetery and that there were signs that a burglary had been committed.

What I have stated thus far constituted my findings of fact.

It seems quite obvious on the state of the testimony that the notions to suppress the tangible evidence must be denied. The defendant has failed to establish by a fair preponderance of the credible evidence that any of his constitutional rights were invaded at any stage of these proceedings so far as the search and seizure was concerned. Since the defendant was using what was quite obviously a forged license, it was proper under all of the circumstances above described that the police seize the automobile as

evidence. The inventory search at the police station was perfectly proper under the authority of *People v. Sullivan*, 29 NY 2d, 69, and the cases therein cited.

The only caveat to be found in *Coolidge v. New Hampshire*, 403 US, 443, which deals with such a search, is that at the time of the taking of the inventory, the police officers should be in the process of conducting an inventory rather than a search for contraband. The facts in this case, I have concluded, indicate that at the time of the taking of the inventory, the police were doing precisely that, they were making an inventory and had not as yet determined that the tangible evidence had been stolen from the Holy Rood Cemetery. As I pointed out in my findings of fact, such a determination was made after a telephone call to the owner. The telephone call to the owner was not made until after the boxes were unloaded and inventoried. The address of the owner was found inside the box.

I find, then, that the seizure of the automobile was proper, the inventory search at the police station was proper, and it follows, therefore, that the search and seizure-suppression motion must be denied.

So must the motion to suppress the statements made by the defendant. On at least three separate occasions the defendant was advised of the four-fold warnings required

under Miranda. On each occasion he stated that he waived such rights, that he did not wish to remain silent, and that he did not wish to consult a lawyer before making the statements. It must, obviously, therefore, be held that the statements were voluntary, that there was no violation of any of the defendant's constitutional rights, and that there was no violation of Section 60.45 of the Criminal Procedure Law. Since the statements were not involuntarily made, there was no threatened use of physical force upon the defendant or any other improper conduct or undue pressure which would have impaired his physical or mental condition. There were no statements made or any statements of fact which would create a substantial risk the defendant might falsely incriminate himself.

I have already held that the statement was not obtained in violation of any rights which the defendant may derive from the Constitution of the State of New York or of that of the United States. Both motions to suppress, therefore, are in all respects denied.

TRIAL

SERGEANT JOHN J. HORAN'S testimony was similar to that he had given at the Huntley Hearing (106-194A;53-547)* Horan could not recall if Butler's car window had been rolled up (142). The passenger in Butler's car was of average build and appeared to be in his 20's.(140).

Horan checked to see if the vehicle had been reported stolen and he learned that it had not (146). Horan had no information at the time of Butler's arrest that the tool boxes were stolen goods (155). Horan asked Butler who the tools belonged to, and Butler replied that he thought they were the passengers (148).

Butler was not intoxicated when arrested and no sobriety tests were made (156).

Horan testified that he drove Butler to the Precinct and turned him over to Detective Gozaloff:

I explained to Detective Gozaloff what the situation was, what I had done, and that there was tools in the vehicle also, which the subject could not make reference to the ownership, that it didn't look right. So Detective Gozaloff came out to the car with me, and he looked into the car himself, and then he went back with the defendant (118-119).
(emphasis added)

Butler's car was a four door sedan and was parked in front of the Precinct foyer, about 13 feet away (159-161). The inventory of its contents began around 11:45 P.M. (158). The inventory list took about two hours to compile and covered 2 - 3 pages of scratch sheets (167). Horan turned these scratch sheets

over to someone who typed them up (541). Horan never had to sign it (541). Horan could not give any estimates at all as to how many articles were inventoried (167). He could not even estimate if there were more than a hundred (167).

Horan identified the bolt cutters and photographs of the tools removed from the car (121;128-29). The bolt cutters, whose handles could have been seen from outside the car, had been found underneath the smaller boxes (129-132). Many other tools were lying on the floor also (131).

It took between 1 - 1 1/2 hours and 10 - 11 policemen, 4 - 5 working at any one time, to unload the car (120;164-165;169).

The policemen were being very careful not to strain or injure themselves (166). Four or five articles needed more than one policeman to carry, including two large boxes, another box weighing about 150 pounds, and a pail of tools (170-173). The two large boxes weighed about 200-300 pounds each (125). Horan was present throughout the unloading except for time spent carrying objects into the precinct (169). Horan testified that he personally carried in a total of two or three items, one of which was an empty liquor bottle (169-170).

The first box taken into the Precinct was opened and the owner's name found therein (119;123;162). Horan testified that it was too dark outside to see into the tool box (123).

Ten witnesses later, Horan was recalled to the stand (536). He testified that he believed the license was a forgery because its initial letter was "C" and the first two digits should have been 18, but were not (537). Horan then identified a document bearing his signature as being the complaint that had been filed against Butler the night of the arrest (537). According to the complaint, the first letter of the license was "B". The complaint also listed the driver's license as being in the name of "Joseph Brooks" -- not James Brooks as Horan had previously testified (539-40). Horan testified the information in the complaint concerning the license, which he assumed had been transcribed by a detective, was false (539-40).

Upon redirect examination, the following ensued:

Q. Assume that that was in fact the correct number. Just make that assumption, and you stopped a person by the name of Brooks, last name being Brooks.

A. Yes.

Q. Is there anything about that number ... which would lead you to believe that the license was a forgery?

A. Yes, sir. Other than the -- we have three checks, other than a B, there are two more checks that we can make in the field about a license.
(543-44) (emphasis added)

One of the checks that could be made would be to check the 13th, 14th and 15th digits of the number to see if they corresponded with a number on a card issued by the SCPD (543). The license number, as shown by the complaint, was B028765899843 5246-36 (538). Horan testified that he "believed" the number should be 526 (545). Horan answered "no" when asked:

"and is there a 526 anywhere in the body of that number?" (545) (emphasis added)

PATROLMAN VINCENT FALLICA, a member of the Suffolk County Police Department, testified that on April 3, 1972 he was working a tour of duty with Sergeant Horan when Butler's arrest occurred (206-07). His account of the circumstances leading up to the arrest was basically similar to Horan's, although Fallica thought the speed limit was only 40 miles per hour rather than 55 (222). Covering a distance of approximately one mile (208; 222), the total time elapsing between initial sighting of the speeding vehicle and its stop at the diner was "40 seconds, tops." (225) Butler had an odor of alcohol about him, but he was not given a sobriety test (231). The car, except for its speed, was not being driven in an erratic manner (231).

Butler was arrested for possessing a fraudulent license, handcuffed and seated in the police car (211). Fallica did not personally see the license (230). The only indication Fallica had that it was a forgery was Horan's statement to him that Albany had reported it invalid (233). Horan then searched for the passenger (212). The passenger was about 5'8" or 5'9" and was around 24 - 25 years old (227). Horan came back and read Butler the Miranda warnings (212). Horan then questioned Butler about the tools (236).

Fallica testified that he drove Butler's car back to the station to impound it, arriving around 11:05 P.M. (215-216). The tools were piled so high in the vehicle that "I couldn't see out of my rear view mirror from the inside of the car." (215)

Fallica parked the car in front of the detectives' office, about 20 feet from its entrance (243-244). Horan went into the

Precinct while Fallica waited for him (216). When Horan returned they proceeded to unload the car (716). A total of about five police officers were engaged in unloading the tools (218;250).

Fallica and Horan opened the first tool box unloaded and found a name contained therein (246). Horan gave the name to Detective Gozaloff and five minutes later went outside again to continue unloading(249).

The unloading process took about an hour and a half (253). But for one break, Fallica worked constantly during this period unloading the car (253-254). Fallica testified that he personally assisted in carrying approximately three of the boxes into the station house (254). There were 7-8 boxes in all (254).

Fallica identified photographs of the items removed (217-218). In addition there were two clocks on the back seat floor, bolt cutters on the back seat floor underneath a small toolbox, and an empty bottle of Dewar's on the front floor, passenger side (219-221). All of the boxes were on the back seat except for two small ones which were on the back seat floor (258-259).

The boxes were difficult to remove from the vehicle (257). Two men carried a box weighing about 50 pounds and three or four carried the two largest boxes, each weighing almost 300 pounds (255-258).

The unloading began at about 11:10 P.M. (245) and inventory was finally completed around 2:45 A.M. (220).

DETECTIVE GERARD GOZALOFF'S testimony was similar to that he had given during the Huntley Hearing (260-301).

After bringing Butler into the station Horan conversed with Gozaloff and gave him the forged license, although Horan did not specify exactly what was fraudulent about it (276). Gozaloff testified that he did not know where the license could presently be located (276). Horan also told Gozaloff about the tools in Butler's car (278) and told him that Butler's passenger had "gotten away" (285;287). (emphasis added)

After this conversation, Horan and Gozaloff went outside to look at the tools in Butler's car (262;278). Gozaloff returned inside and Horan rejoined him shortly thereafter, at which time they discussed the ownership of the tools (262;279). Horan told Gozaloff that he had found what he believed to be the name of an owner inside one of the boxes (263). This person was contacted by telephone (263;279), and after the phone call, Gozaloff began interrogating Butler, starting around 11:30 P.M. (280).

At this time the only charge lodged against Butler was possession of a forged instrument and Gozaloff was satisfied that Butler's car had not been stolen (285-286). Gozaloff testified, however, that during the interrogation he was concerned about the charge of criminal possession of stolen property (286). After reading the Miranda warnings to Butler, Gozaloff asked one question about the forged driver's license, and after receiving no response, immediately began questioning Butler about the tools (264;282). Gozaloff received a negative

response when he asked Butler if he had ever worked at or lived near the cemetery (266-267).

Gozaloff testified that Butler cooperated in the interrogation "to a certain extent," answering "half" of the questions (288). Gozaloff questioned Butler about the tools many times and Butler's story never varied (292-293).

Upon finishing his interrogation of Butler and the attendant paperwork at around 12:20 A.M., Gozaloff "went out to the steps of the Precinct where the vehicle was" and helped complete the unloading of the car (267-268). The items that had already been unloaded had been placed in the hallway of the station house (268). Gozaloff identified bolt cutters and photographs of removed tools (269). Gozaloff picked up one end of a large tool box for several seconds, but eventually had to put it back down (271). He estimated his end to weigh about 150 pounds (271). Gozaloff testified he was 5'9" and weighed 180 pounds (272). The unloading had been completed when Gozaloff went home at 1:00 A.M. (272). The unloaded articles were being "invoiced" pursuant to Suffolk County Police Department rules and regulations at that time (273).

On April 10, 1972, seven days after the initial arrest, Butler was charged with and pled guilty to a misdemeanor in Suffolk County, possession of stolen property (290;300).

Subsequent to Gozaloff's testimony, Butler, through counsel, requested permission to take the minutes of the suppression hearing back to jail with him and the Court proceeded to make

the necessary arrangements with the Sheriff (304). Secondly, Butler, again through counsel, requested that "certain records" be produced by the prosecution pertaining to a purported contact between Detective Leahy and Butler after Butler's incarceration in Nassau County Jail (304). Butler's purpose for the request was apparently to test Leahy's credibility (307).

Butler took an active part in the discussion (305-308). At one point he stated that he had been arraigned in District Court prior to being photographed and fingerprinted (306).

It was finally decided that no action would be taken since Leahy, the next-scheduled witness, would probably have the relevant records with him (308-309). If necessary, the information could be elicited on cross-examination (308). Defense counsel stated that he had "tried to tell that to Mr. Butler." (308).

DETECTIVE JOHN LEAHY'S testimony was similar to that he had given in the Huntley Hearing (311-381).

Pursuant to a Suffolk County Police Department request, a Nassau County Police Department patrol car confirmed that a burglary had been committed at Holy Rood Cemetery in Nassau County (342). Upon receiving this report around 11:40 P.M. Leahy immediately drove to the cemetery, about ten minutes away (342-343).

There Leahy noticed a warehouse window which had been pried three-fourths open (313; 319; 344). No other entrance to the building appeared to have been forced open (348). Inside the warehouse, Leahy observed two partial footprints on a table below the open window (321; 346). The police did not preserve them (346). An empty bottle of "Dewar's" was found in the warehouse (321-322). It was sent back to the station
"nobody threw it in the garbage" (362) A-5

Four fingerprints, two of them "identifiable", were lifted from the scene (319). Leahy was unsure if they had been lifted from the window or the bottle (353; 363). There were other fingerprints but the combination of dampness, moisture and heavy rain destroyed them (319-320).

A. Well, the night of the occurrence it was a very damp night out and the moisture had gotten to the prints and we were unable to lift them until the daylight hours of the next morning, at which time a heavy rain-- they were covered up and a heavy rain had come and destroyed many of the prints.

Q. So out of it you got two prints and two partials?

A. Yes, sir.

The four fingerprints that were recovered were not Butler's (320; 366). Absent a suspect, no further checks could be made to determine ownership because five fingerprints are required (320). Leahy testified that he personally dusted for fingerprints on the window and a bay door (319; 345; 348).

No fingerprints were taken at the Pyramid diner -- the place where "Callahan" escaped (367).

At the Suffolk County Police Department Butler told Leahy about renewing his old acquaintance with "Callahan" (326). Butler thought "Callahan" lived in the Westbury area (330). A subsequent check was made at the police Identification Bureau and the Westbury telephone directory (330). Three "Callahans" were listed but a check at their addresses revealed no red Pontiac, the car "Callahan" had been driving (330-331). A check at the Motor Vehicle Department showed no Steve or Carl Callahan in the Westbury area (331).

Leahy identified a padlock, found twenty yards from the cemetery gate, which had apparently been cut by a sharp instrument (334-335). Leahy identified a pair of bolt cutters as those he had seen before in the Suffolk County Third Squad (333-334). Two days after the arrest Leahy submitted the lock and cutters to the Nassau County Scientific Investigation Bureau (334). The lab report stated that metal fragments removed from cutting edges of the bolt cutters and the metal shackle of the lock were "consistent". (339). "Comparison of tool marks was precluded due to the overlapping of marks and insufficient amount of identifiable marks on submitted lock samples." (339). Neither the lock nor the bolt cutters had been dusted for fingerprints (369).

Leahy testified that the weight of one box he attempted to lift was over 200 pounds (332). Another box weighed about 200 pounds also and smaller boxes weighed 60 to 80 pounds (333). Leahy, himself, weighs 165 pounds and is 5'9" (332).

Two days after the arrest Leahy went to the Suffolk County Jail to lodge a warrant against Butler on the burglary charge (370). The next day he drove out again to the Suffolk County Jail and tried twice to see Butler (370). Butler refused to see him (370). Under cross-examination Leahy stated that he had contact with Butler again on or about August 6, 1972 when he picked him up (either at the Nassau County Jail or County Court) to take him for processing (371). The "processing" consisted of fingerprinting alone (372). Leahy stated later in his testimony that Butler had been processed twice in Nassau County for the same crime, but he did not explain why (378). Leahy stated that while he was taking Butler for processing, he never questioned Butler concerning the facts (367-368; 371-372).

Leahy could not recall who accompanied him when he picked up Butler (372-374). Upon being asked he could not recall if his companion had been "Detective Walford" (374).

The court ordered a recess to allow Leahy to find out who the officer was because, in the Court's words, it wished to conform to "these strange Ideas" of Butler's (376). After the recess, Leahy identified his companion as Detective Walford (379).

Leahy was questioned about what transpired while Butler was being transported for processing:

Q. Did you discuss with him any of the incidents that allegedly took place that evening?

A. No, Sir (371).

Upon resuming the witness stand, Leahy was not quite so positive that no such discussion was held:

Q. Did you mention to him anything about him giving more identification as to this person who allegedly ran away?

A. I don't recall, sir.

Q. Did you tell Mr. Butler at that time that if you weren't able to catch that person, Mr. Butler would have to take the weight for this burglary?

A. No. (380) (emphasis added)

After Leahy completed his testimony, the prosecution, over defense counsel's objection, requested that Leahy be allowed to remain in the courtroom and assist in prosecuting the case (381-382). The Court permitted this, excluding all witnesses from the courtroom save Leahy (382).

DETECTIVE JOHN DABROWSKI testified that on April 4, 1972 he was a member of the Nassau County Police Department (383). He testified that between 1:30 and 1:45 A.M. he searched for a red Pontiac in the vicinity of the Parkway Diner in Nassau County with no success (385). All he found were several trailer trucks and two cadillacs (385-386).

JAMES W. TYMANN testified that he is a foreman at Holy Rood Cemetery (404).

Tymann identified photographs of his and his co-workers' tools and stated that on April 3, 1972 his tool box and tools weighed about 150 pounds (405-407; 416-417). The largest tool boxes belonged to his co-workers weighed over 250 pounds (418). Tymann's name was on a small pill bottle which he had left in the tool box (407). His name was not on the box itself (407).

Leaving his tools inside the garage, Tymann left work on April 3, 1972 at 4:30 P.M. (404). He thought it was a "nice day" when he left (436). Between 11:00 and 11:15 P.M. he received a telephone call from a Suffolk County Police Department policeman:

Q. And what did that person say to you?

A. He asked me if my name was James Tymann, and I said yes, and he said, "Do you have any tools?" And I, of course, said, "Yes" and then he said, "Do you know if they are missing?" I said, "I have no idea." Then he asked me where I worked. I told him Holy Rood Cemetery (407; 429-430).

Tymann went to the cemetery, arriving between 11:15 and 11:30 P.M. (408). He did not remember if it was raining at that time (436). The gates, normally locked, were open (412). At the cemetery Tymann discovered a window partially open with its lock broken off (409-411). The window had been locked when he left work (411). A door next to the window was also open (411). This door can be opened without a key from the inside (422).

Inside the warehouse, Tymann discovered that his tools which had been left on a rollaway cabinet were missing (413;424). Rollaway cabinets were commonly used by the workers to move boxes of tools from one place or another (425;431). Tymann also saw an empty bottle of scotch in his forman, Mr. Woodbury's area (413). The bottle had been almost full and inside Woodbury's desk when Tymann left work (413). Tymann could not remember the brand (432). The workmen had had a drink around 3:00 that afternoon (433).

Tymann identified People's Exhibit 18 as looking like a cemetery lock (419). He also identified a key fitting the cemetery gate lock (420). All the workmen had such keys (420). The key fit the lock (420). Tymann testified that he used bolt cutters often and the lock would have to have been cut by bolt cutters (422-423). Tymann's opinion was that the People's Exhibit 8, the bolt cutters, could have been used to cut the lock (424).

Tymann's estimate of the number of tools stolen was "thousands." (434).

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Tymann testified he had been working at the cemetery for ten years (424). He had never seen Butler in his life (437).

WILLIAM F. OHLAU testified that on April 3, 1972 he was employed as a journeyman mechanic at Holy Rood Cemetery (442). Leaving his four tool boxes in the garage, Ohlau left work at 4:30 P.M. (442-443). Upon returning to work the next day Ohlau found three of his tool boxes missing (444). His big tool box weighted about 250 pounds and the two smaller ones weighed less than fifty pounds (447). Ohlau estimated that the large box alone might have contained over 200 tools (450). Ohlau did not believe the box could be picked up and moved by one person alone (452). The box was not locked when Ohlau left work nor were the drawers inside that box (452). If the box were tipped the drawers would come out (452). Ohlau did not give Butler or anyone else permission to possess the

JOSEPH CARDELLA testified that in April, 1972 he was employed as a mechanic at Holy Rood Cemetery (462).

Leaving his tools in the garage, Cardella left work at 4:30 P.M. (462). He discovered his tools missing when he returned to work the next morning (463). Cardella's tool box, bearing his name on the front of it, weighed around 230 pounds (467;471-473). In the shop the box is on a rollaway which can be pushed from place to place (471). It would take about two men to lift it (471). Cardella and one other person carried it from the police station into his car (472).

Cardella identified People's Exhibit 8 as being Holy Rood bolt cutters (472-473). "I have used them." (472) Upon persistent redirect examination Cardella insisted repeatedly that these were indeed Holy Rood bolt cutters, or at the very least "we have one just like it" (474-475).

ROY SOLLO testified that on April 3, 1972 he was a mechanic at Holy Rood Cemetery (476). Leaving his tools on a roller in the garage, he went home between 5:00 - 5:30 P.M. (477;488). He learned next day that his tools had been stolen (478). His tool box weighed between 250-300 pounds (480). Ohlau's tool box was heavier still (483). At the police station he and Ohlau carried Sullo's box out to the car, a distance of about 50 yards (488-489).

Sullo said that during his tenure at Holy Rood Cemetery he had never seen any bolt cutters at all (486).

ARNOLD WOODBURY testified that on April 3, 1972 he was supervisor in charge of maintenance at Holy Rood Cemetery (490). Woodbury identified People's Exhibit 13 as being the building he was in charge of (490).. When Woodbury went home

the doors and windows were locked (491;494-495). Woodbury specifically remembered checking the window to see if it was locked (516).

After receiving a telephone call from Mr. Tymann later that night, Woodbury went back to the cemetery, arriving around 11:25 P.M. (494;510-511). The weather was damp but Woodbury did not recall actual rain at that time (520). Upon arrival, Woodbury noticed the open gate, the open window, and the open door (494). The lock on the window had been broken (495).

Woodbury identified photographs of the stolen tools, a battery charger, and a wheel balancer as belonging to the cemetery and its workmen (492). The battery charger weighed 45-50 pounds and the wheel balancer weighed 75-85 pounds (516). All of these tools were in the cemetery building when Woodbury, the last one to leave the building, went home around 5:30 P.M. (492-493). Woodbury had no idea who owned the clocks shown in the photographs (492). Upon entering the building Woodbury discovered that these tools were missing (495). There was direct passage from where the tools were stored and the open door of the lunchroom, some 25 feet away (514). The entire compound area leading up to the building is concrete and a car could have been driven up through the gate to that door (517).

Woodbury also observed a pair of gloves in the car and noticed later that "Detective Leahy was looking at them. I did not recognize them, although they could have belonged to anybody in the place because there is many men there." (520) (emphasis added).

A bottle of scotch had been removed from Woodbury's desk and consumed (497;519). When Woodbury left work it had been almost full (497;519). He could not recall the brand (521). A-63

Detective Leahy arrived about 11:45 P.M. and left about one-half hour later (496). Woodbury did not observe Leahy dusting any areas for fingerprints (515;521). Leahy was out of Woodbury's presence for some period of time (521). A policeman came after Leahy left and dusted the door, window, and bottle for fingerprints (518). This same policeman covered the window with paper (521). Next morning, another policeman also attempted to take prints (521).

Woodbury found doors leading to the bay area of the building locked (503). They could be opened from inside and locked from outside without a key (503-504). In front of these bay doors outside Woodbury found some garbage -- empty paper bags, beer cans, etc -- which appeared to be the remnants of a person's lunch (498). This garbage had not been there when Woodbury left work (498).

Woodbury testified that although there were several pairs of bolt cutters at the cemetery, People's Exhibit 8 was not one of them (504-505). All cemetery bolt cutters have straight jaws while People's Exhibit 8 had a curved jaw (506). Woodbury also testified that the morning after the burglary he had a workman search for the missing gate lock and after it was found about 60 feet from the gate he turned it over to Detective Leahy (508).

Woodbury had never seen Butler before in his life (502).

JOSEPH CARDELLA, who had previously been emphatic in his identification of People's Exhibit 8 as belonging to Holy Rood Cemetery (472-475), resumed the stand and stated that he was wrong; the bolt cutters did not belong to the cemetery (527-530). Cardella testified that the only person he had talked to since giving his earlier testimony was the district

WASYL HORYN testified that on April 3, 1972 he was Assistant Superintendent in charge of the grave digger's department (531). Horyn locked the gates that night at 5:30 P.M. after everyone had left the cemetery (532).

POINT THREE

THE COURT ERRONEOUSLY CHARGED THE JURY AND SHOULD HAVE DISMISSED THE INDICTMENT BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH GUILT

It is well-settled that before a conviction of guilt can result from circumstantial evidence the inference to be drawn from the facts must exclude to a moral certainty every other reasonable hypothesis but guilt; and the facts must be inconsistent with defendant's innocence. People v. Weiss, 290 N.Y. 160; People v. Bearden, 290 N.Y. 478; People v. Cleague, 22 N.Y.2d 363. As noted by the Court below all of the evidence connecting defendant with commission of the crime of burglary is circumstantial. (Minutes of Trial, p. 594).

The Court below would have us believe that on the strength of Knickerbocker v. People, 43 N.Y. 177 (1870) there was enough evidence adduced for the jury to render a verdict of guilty. (Minutes of Trial, p.99). The Court, however, was in error in placing undue emphasis on the Knickerbocker rule that recent and exclusive possession of the fruits of crime, if unexplained or falsely explained, will justify the inference that the possessor is the criminal. The fact is that the Courts are not so slavishly bound to the Knickerbocker rule as to warrant permitting a presumed innocent person to be placed in danger of being convicted of whatever particular crime the District Attorney charges him with, simply because he possesses the fruits of crime. As Justice Cardozo stated in People v. Galbo, 218 N.Y. 283, 290-291 (1916):

Only half the problem, however, has been solved when guilty possession fixes the identity of the offender. There remains the

question of the nature of his offense. Here again the facts must shape the inference. Is the guilty possessor the thief, or is he a receiver of stolen goods?...The problem is a hard one. To solve it we must steadily bear in mind that the inference of guilt to be drawn from possession is never one of law.... Other facts may neutralize it, or repel it, or render it so remote or tenuous or uncertain that in a given case we should reject it.

Recent cases have followed Justice Cardozo's directive and refused to permit a conviction of burglary when only a conviction of a lesser offense was warranted. People v. Smith, 39 A.D.2d 855 (1st Dept.1972); People v. Garcia, 41 A.D.2d 821 (1st Dept. 1973). The rationale of these cases requires a finding that the evidence here, although sufficient to convict Butler of possession of stolen property, was insufficient to convict him of burglary.

In People v. Smith, supra, an apartment had been burglarized. Defendant was apprehended by a policeman in the same building. Defendant had in his possession property stolen from the apartment. Defendant denied taking part in the burglary and stated that he had gotten the stolen goods from a third person who had fled from the police.

The Smith Court reviewed Knickerbocker and Galbo, supra, and concluded that the evidence was insufficient to sustain a conviction of burglary.

The evidence is insufficient to establish that defendant ever entered or at any time remained unlawfully in the burglarized premises....[T]here is no evidence that the defendant was in the vicinity of the third floor burglarized apartment...; nor was there proof that defendant was unlawfully on the stairs when he was first seen and apprehended.

...Where, as here, an alleged conviction rests on circumstantial evidence, "The evidence must be such as to exclude, to a moral certainty, every hypothesis but that of [defendant's] guilt of the offense imputed to him" (People v. Woltering, 275 N.Y. 51,61). Here, the evidence was not sufficient to duly establish the inference, to the exclusion of any other reasonable explanation under the evidence, that the defendant had actually entered or had been in the burglarized apartment or had participated in the entry thereof. Smith, supra, at 855-856.

The facts in Smith and People v. Garcia, supra, are basically the same as in the instant case: a burglary is proven; stolen goods are found in defendant's possession; the defendant proffers an explanation as to how he obtained them which implicates a third party; this third party is seen fleeing from the police; he is never apprehended; no evidence is adduced placing defendant in the immediate vicinity of the crime.

Since the facts in this case are basically the same as in People v. Smith and People v. Garcia, supra, the same holding must result: insufficient evidence to convict of burglary. Pursuant to CPL §290.10(1) the Court below was authorized to dismiss the indictment at the close of the prosecution's case on the ground that it was not "legally sufficient" to establish guilt. The Court further compounded its error by proceeding to include in its charge to the jury a statement that the jury was still free to draw an inference of guilt from recent and exclusive possession by Butler of fruits of the crime. Under the rationale of both People v. Smith, supra, and People v. Garcia, supra, the judge was no longer entitled to charge the recent and exclusive possession doctrine to the jury. The jury could

have rendered a guilty verdict here solely on the basis of Butler's possession of the goods -- a verdict which the Court explicitly condoned in its charge. Under Smith, Garcia and Galbo, supra, this alone cannot be enough to convict.

The error is preserved for appeal in either of two ways. First, defense counsel made a motion to dismiss the indictment at the end of the prosecution's case which was wrongly denied. Secondly, despite the fact that no objection was made to the charge to the jury, the Court has the power to reverse the judgment in the interest of justice and should do so here. CPL §470.15(3)(c); People v. Kelly, 12 N.Y.2d 248; People v. Jones, 32 A.D. 1069 (2d Dept., 1969)

The basic reasons why the Court should exercise its discretion are the lack of any strong evidence against Butler and the fact that police investigation techniques have improved tremendously since 1870 when the Knickerbocker decision was handed down. A hundred years ago, the prosecution often had little to go on to convict a person of burglary no matter how much investigation was done. One hundred years later, we have scientific investigation bureaus and highly trained police officers which, if used effectively, can determine much about the actual perpetrator of a crime. There simply isn't the need in the 1970's that there was in the 1870's for such an inference. Without that inference charged by the Court below the prosecution had no case. Certainly if the prosecution had "overwhelming" evidence of Butler's guilt there would be no need to reverse the conviction. People v. Jones, 32 A.D.2d

1069, 1070 (2d Dept., 1969). But the prosecution here has little else besides that inference to base its case on. It is in such a case as this, where the question of a defendant's guilt or innocence is a close one, that the Court should exercise its discretion to reverse a conviction following an unprotested error in the charge to the jury. People v. Amoroso, 38 A.D.2d 563 (2d Dept., 1971).

POINT FIVE

PROSECUTION OF APPELLANT IN NASSAU COUNTY
VIOLATED APPELLANT'S RIGHT NOT TO BE TWICE
PLACED IN JEOPARDY OF LIFE AND LIMB

After pleading guilty to criminal possession of stolen property in the third degree in Suffolk County, Appellant was sentenced to one year in the Suffolk County Jail on May 19, 1972. See App 1, Transcript of Record; cf Minutes of Trial, 290, 300.

On November 9, 1972 appellant was indicted by a Nassau County grand jury under Indictment Number 35943 charging him with burglary in the third degree and grand larceny in the second degree. Following a defense motion to dismiss on grounds of double jeopardy, the grand larceny count was dismissed on February 27, 1973. A portion of the above motion which sought dismissal of the burglary count was denied. See Appendix 2, Order of Court.

Having completely served his sentence in Suffolk County, Appellant was brought to trial in Nassau County on the burglary charge on April 24, 1973. Following his conviction after jury trial of burglary appellant was sentenced on June 1, 1973 to an indeterminate term with a maximum of five years.

Such prosecution in Nassau County, should be held to have been barred by the earlier prosecution in Suffolk County for criminal possession of property stolen as a result of that burglary.

The prohibition against placing a defendant twice in jeopardy of life or limb and not being twice prosecuted for

the same offense is firmly imbedded in both the New York State and United States Constitution. See 5th Amend, U.S. Const.; Art I, §6 N.Y.S. Constitution. In New York State the legislature has attempted to explain the meaning of this prohibition by enacting Article 40 of the Criminal Procedure Law.

Section 40.40 of the Criminal Procedure Law provides that when two or more offenses are joinable in a single accusatory instrument because they are based upon the same criminal transaction, but one of the offenses is not charged therein (or any other accusatory instrument filed in the same court) despite possession by the people of evidence legally sufficient to support a conviction of the defendant for the uncharged offense and the action on the charged offense is disposed of as in appellant's case, any subsequent prosecution for the uncharged offense is thereby barred. Section 40.40 is directly on point in appellant's case.

Not only were the possession of stolen property offense and the burglary offense clearly based upon the same "criminal transaction" as that phrase is defined in section 40.10(2) of the Criminal Procedure Law, but the Suffolk County authorities clearly possessed "legally sufficient" evidence to support a conviction of Mr. Butler for the burglary offense. Under the rule enunciated in Knickerbocker v. People, 43 N.Y. 177 (1870), simple possession of the stolen property would have been legally sufficient evidence to support a conviction. As a matter of

fact, the actual prosecution in Nassau County was grounded, almost totally, upon this so-called Knickerbocker rule.

The above makes it abundantly clear that Suffolk County and Nassau County should have reached some agreement among themselves as to who should bear the burden of prosecuting appellant so that the dictates of Section 40.40 could be complied with. The logical solution would have been for Nassau County to handle the entire prosecution from the beginning since the initial offense, burglary, occurred solely within their jurisdiction. By the same token there can be little dispute that Nassau County would have had jurisdiction over any prosecution of appellant for larceny or criminal possession of stolen property; in order to reach Suffolk County in possession of stolen property appellant would have had to travel through Nassau County. By abdicating to Suffolk County its responsibility for initiating prosecution, Nassau County, in effect, estopped itself from any further prosecution of appellant pertaining to that criminal transaction.

Another solution that the two counties might have been able to reach would have been for Suffolk County, once it had initiated prosecution with Nassau County's approval, to follow through and dispose of all matters arising out of the same criminal transaction. Assuming no objection by the defendant, such an action would have disposed of the entire matter and would have involved nothing more than cooperation between the two counties as to the providing of necessary witnesses and information. Such was the situation at the actual burglary

trial in Nassau County. Three of the main prosecution witnesses, for instance, were members of the Suffolk County Police Department. If the trial had been held in Suffolk County, Nassau County could presumably provide its police officers for testimonial purposes.

The fact remains, however, that neither of these alternatives was utilized. Certainly, if appellant had explicitly agreed or requested that he be tried separately, there would be no double jeopardy problem here. No such agreement or request was made, however. Rather than reaching an agreement beforehand so as to comply with the mandate of section 40.40 the two counties chose to prosecute appellant separately, even though it meant that appellant would be placed in jeopardy twice for an offense arising out of a single criminal transaction.

The damage inflicted upon appellant by forcing him to undergo separate trials has been great. He has not only been forced by the state "to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty," but the public has needlessly been forced to undergo the expense of redundant litigation. See Green v. United States, 355 U.S. 184. Perhaps the most damaging and cruel injury caused by the state's action, however, is that appellant has been compelled to serve an extra year in prison before being considered for parole.

Appellant received an indeterminate sentence in Nassau County with a maximum of five years. Consequently, appellant

would not be eligible for parole consideration until he had served a minimum of one year of that sentence. See Penal Law §70.00; Correction Law §212. Appellant has not even been eligible for parole consideration until June 1974. If appellant had been prosecuted in May of 1972 with the criminal possession of stolen property charge and had been found guilty thereof he would have been eligible for parole consideration in May of 1973, more than a year earlier. See Penal Law §70.35. Thus, not only may the public have been forced to support appellant at public expense for an additional year but appellant has been forced to live an additional year with no hope of imminent release.

The action of the state which has not only violated the terms of section 40.40 of the Criminal Procedure Law but occasioned grievous injury upon appellant should be held to be error.

Although not raised in the Appellate Division, this issue is preserved for review pursuant to Section 470.35 of the Criminal Procedure Law.

Court of Appeals

State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

JOSEPH JOHN BUTLER,

Defendant-Appellant.

RESPONDENT'S BRIEF

Statement

This is an appeal from a judgment and order of the Appellate Division, Second Department, dated May 13, 1974 [44 A.D. 2d 423 (2d Dept. 1974)], affirming unanimously a judgment of conviction rendered in the Nassau County Court for Burglary in the Third Degree.

The indictment charged Butler with the crimes of Burglary in the Third Degree and Grand Larceny in the Second Degree, the latter count being subsequently dismissed. The charges grew out of a burglary of a quantity of tools from the Holy Rood Cemetery located in Westbury, New York, on April 3, 1972.

Trial was held before the Hon. Bernard Tomson, County Court Judge of Nassau County, and a jury, and on June 1, 1973, Butler received an indeterminate sentence not to exceed five years' imprisonment.

Leave to appeal to this Court was granted by th Honorable Harold A. Stevens, and a timely notice of appeal was duly served and filed.

By order of the Appellate Division, Second Department, dated July 31, 1973, defendant's application to appeal as a poor person was granted and the office of James J. McDonough, Esq., Legal Aid Society of Nassau County, was assigned to prosecute the appeal.

The respondent is now represented by the Hon. Denis Dillon, District Attorney of Nassau County (Assistant District Attorney Barbara J. Crum Neale on this appeal).

Introduction

On April 3, 1972, the warehouse of the Holy Rood Cemetery, located on Old Country Road in Westbury, New York, Nassau County, was the subject of a burglary wherein assorted tools valued in excess of Fifteen Hundred (\$1,500.00) Dollars were stolen.

Joseph John Butler, defendant herein, was apprehended while driving in Suffolk County at approximately 11:00 p.m. on April 4, 1972, for possessing a forged driver's license. Subsequent investigation led to the conclusion that the numerous boxes of tools found in the back of Butler's car had been stolen from the cemetery in Nassau County. Butler was first dealt with by the Suffolk County authorities, wherein he was charged with Possession of a Forged License and with Criminal Possession of Stolen Property. Defendant pled guilty in Suffolk County to an amended information charging him with Criminal Possession of Stolen Property in the Third Degree and Possession of a Forged Driver's License, whereupon he was sentenced on May 19, 1972, to a term of one year's imprisonment.

Butler was brought to the Nassau County District Court for arraignment in August, 1972, and, subsequently, on November 9, 1972, the Nassau County Grand Jury charged him with the crimes of Burglary in the Third Degree and Grand Larceny in the Second Degree, under Indictment Number 35943. On February 21, 1973, the Hon. Douglas F. Young of the County Court dismissed the Grand Larceny charge, in view of the defendant's previous conviction in Suffolk County for the crime of Criminal Possession of Stolen Property. At that time, the court denied the motion to dismiss the Burglary count.

Prior to trial, on April 23, 1973, a combined search and seizure and *Huntley* hearing was held before the Hon. Bernard Tomson. After hearing the testimony of the witnesses presented, the court, on April 23, 1973, denied the motions to suppress both the tangible evidence seized and the statements made.

A trial was thereupon commenced before the Hon. Bernard Tomson, County Court Judge of Nassau County. At the close of the trial, the jury found defendant guilty of the crime of Burglary in the Third Degree. On July 1, 1973, Butler was sentenced as indicated above.

Butler appealed the judgment to the Appellate Division, Second Department, which subsequently, on May 13, 1974, unanimously affirmed the conviction.

On appeal to this Court, defendant claims that his judgment of conviction should be reversed on the grounds that (1) the court erred in its finding that the inventory search was proper; (2) the court erred in finding the presence of probable cause to arrest; (3) the court should have dismissed the indictment on the basis of insufficiency; (4) defendant's guilt was not established beyond a reasonable doubt; and (5) the Nassau County prosecution of defendant

violated his right against double jeopardy. For the reasons set forth *infra*, the People submit that defendant's claims are without merit.

The Hearing

The People's Case

SERGEANT HORAN, testifying on behalf of the People, stated that while he was on a tour of duty on April 3, 1972, he observed a 1961 Oldsmobile traveling in a southbound direction on Route 111 at a high rate of speed. He noticed that the vehicle was very low to the ground, as if it were dragging and as if its springs were broken (4).^{*} The Sergeant stated that after turning on his light and siren he proceeded to chase the vehicle for a distance of about one mile, the entire activity occurring in Suffolk County (5). After both vehicles stopped at the Pyramid Diner, the officer demanded and received a registration for the vehicle, and an operator's license in the name of James Brooks (5). After examining the license and detecting some patent evidence of forgery thereon, the Sgt. proceeded to check through the Albany computer of the Motor Vehicle Bureau the status of the proffered license. The results of his investigation confirmed his observations, namely, that no such license was ever issued with that number or that name (7). Sgt. Horan had observed that the defendant's license was typewritten by a regular "home typewriter" and not by the IBM machines; that the motorist identification number was out of sequence, and that the first letter of the license number was not a "B" which it should have been had his name been Brooks. After receiving this communication with respect to the license, the officer told the defendant that he was being arrested for possession of a forged instrument and advised him of his fourfold *Miranda* rights (7, 8). The defendant indicated that he understood each of the rights that were

^{*} Numbers refer to Search & Seizure and Huntley Hearing.

explained to him and that he did not wish to contact a lawyer (8).

While standing outside the defendant's vehicle, Sgt. Horan noticed that there were seven large tool boxes inside the vehicle piled high on the back seat. The defendant, in response to a direct question by the officer, stated that he did not know to whom the property in the rear of the car belonged (8).

The male passenger accompanying the defendant ran out of the vehicle into the diner and fled through a rear bathroom window and was not apprehended (9).

The defendant, having been placed under arrest, was driven by Sgt. Horan to the Third Precinct Police Station in Suffolk County and the Sgt's. partner drove the vehicle in which the defendant had been riding to the Precinct.

Sgt. Horan testified that the Suffolk County Police have rules and regulations governing procedures with respect to the taking of an inventory of the contents of seized automobiles. He stated that upon the impounding of a vehicle, an inventory of all of the articles in the vehicle must be made (11, 19). Further, he stated that the vehicle in question was impounded and its contents, including those in the trunk, were inventoried pursuant to the aforementioned rules and regulations (11). Photographs of the items in the trunk and on the back seat were entered in evidence. A large pair of bolt cutters, found on the back seat, were not photographed but were physically introduced.

After the vehicle was removed to the Precinct and the inventory of the vehicle's contents was begun, the first tool box was opened and inside was discovered a name, telephone number and address, presumably of the owner of the tool box. Additionally, "Holy Rood Cemetery" was written on some of the items (18, 19).

Approximately an hour after the initial stop of the vehicle, the owner of the stolen tools was contacted. The officer testified that he had no reason to believe that the items were stolen prior to taking them out of the car (19). The owner of the tools stated to the officer that he had last seen the tools between 5:00 and 6:00 p.m. when he locked them up at the Holy Rood Cemetery. Upon instructions of the police, the owner checked the cemetery and advised the Detectives that the workshop of the cemetery had been broken into and quite a few tools were missing (10).

The Sgt. knew, from examining the documents in question, that the car was not the defendant's, prior to the inventory and removal of articles therefrom, and the removal of these items was subsequent to the defendant having told the police that the items in the vehicle were not his.

No search of the vehicle was conducted at the actual scene, aside from any visual observations made by the officer standing alongside the car in the well-lighted area of the diner (47). After the vehicle was transported to the Third Squad, Sgt. Horan, with the aid of other detectives, inventoried the property.

At the time of the inventory it was not known that the property being removed from the vehicle was the proceeds of a burglary. In fact, the rules and procedures followed by the police required that everything be inventoried until it could be determined who the proper owner was (50). An empty bottle of liquor was removed from the vehicle in addition to the other property (50).

DETECTIVE JOHN LEAHY of the Nassau County Police Department testified next on behalf of the People. Det. Leahy arrived at the Third Squad in Suffolk County and interviewed the defendant. He read the defendant his *Miranda* rights from a card, after which the defendant

waived those rights and agreed to speak to the authorities (70-71).

The defendant stated that he had been drinking in Westbury and that he met an old friend or acquaintance named either Carl or Steve in a diner and that this friend asked him if he could transport him and a load of merchandise to Suffolk County for a consideration of \$50.00 inasmuch as the friend's vehicle had broken down (72). At the direction of the Detective, the Third Precinct of Nassau County searched for the allegedly broken down vehicle with negative results (73). The defendant refused to tell the detective his destination in Suffolk (73). The defendant was unable to supply the detective with the address or other information that could lead the detective to his companion. The defendant indicated he had been drinking (73). The detective testified that he encountered a great deal of difficulty in attempting to lift the tool chests and that he was unable to get them off the ground (75).

Only after the defendant was informed that tools found in his car were the proceeds of a burglary of a cemetery did he tell the detective about his friend named "Carl" (86). The defendant then indicated that he didn't know anything about the burglary and that he didn't do it (85).

DETECTIVE GERARD GOZALOFF of the Suffolk County Homicide Squad testified that he was attached to the Third Detective Squad in Suffolk on April 3, 1972. He administered the *Miranda* warnings to the defendant who then waived his constitutional rights. The defendant, pursuant to questions posed by the Detective, stated that he had met someone in Mineola and that he, the defendant, knew that the tool boxes were "hot", and that this person wanted to transport them to Suffolk County. He denied breaking into Holy Rood Cemetery and denied knowing his friend's name

(99). The Detective had learned that the tool boxes were owned by someone other than the defendant and that they were missing from the cemetery before he questioned the defendant (100). The defendant refused to give a written statement (101).

Detective Gozaloff photographed the proceeds and helped remove them from the auto (103). He testified that the tool boxes were very heavy (103).

Detective Gozaloff testified that the vehicle was unloaded after the defendant was lodged in detention (104). While the Detective had been made aware that the tool boxes were stolen as he was interrogating the defendant, they were not removed prior to their conversation (108).

The Court denied both motions to suppress and made findings of fact and conclusions of law (see Defense Appendix d-1).

The Trial

The People's Case

SERGEANT JOHN J. HORAN of the Suffolk County Police Department testified that he was on a tour of duty on April 3, 1972, with a brother officer, Ptl. Vincent Fallica, and that while on this tour of duty he observed a vehicle traveling at a high rate of speed at approximately 11:00 p.m. (107-108*).

The vehicle was very low to the ground and it appeared that the springs or shock absorbers were broken inasmuch as the vehicle was no more than four inches off the ground (109). The officers pursued the vehicle with red light and siren on and followed it into the Pyramid Diner's parking lot (109-110). As the pursued vehicle stopped, a passenger in the vehicle fled into the diner's men's room.

* Numbers refer to Minutes of the trial.

The operator of the vehicle was asked to produce his license and registration (111). The registration, in the name of one Carol Armstrong and not the defendant, matched the vehicle. The license which was produced was in the name of one James Brooks (112). Upon examination, the officer's experience dictated that the license was a forged instrument, inasmuch as the numbers were uneven and the first letter of his last name did not appear on the identifying number (112-113). The officer then radioed to the computer in Albany and had the license checked. He learned that there was no issuance of such a license number or such a name for that license number (113, 145). The officer immediately advised the defendant that he was under arrest for uttering a forged instrument (113). The defendant was then advised of his fourfold *Miranda* rights (114).

After advising the defendant of his rights, Sergeant Horan entered the diner to search for the defendant's companion and determined that the companion had apparently kicked out the rear window and left the area. The Sergeant radioed for the assistance of a canine unit and other patrol cars (115), but were unable to find him.

The officer, while standing right next to the defendant's vehicle (115), observed loose tools strewn on the front seat and front floor bed of the vehicle and observed the vehicle loaded down with boxes. The Sgt. asked him who owned the articles in the car and the defendant stated that he thought they belonged to his companion (116). The officer described how the boxes in the rear of the car were piled almost to the ceiling (116). The defendant stated that his friend's vehicle had broken down somewhere in Nassau County at a diner and that he was taking the tools to a location in Suffolk County for a fee of \$20.00 (117).

The defendant, under arrest for uttering a forged instrument, was transported to the Third Squad Detective Division and turned over to Detective Gozaloff (118). The Sergeant stated that he told Det. Gozaloff what the background case was and that there were tools in the vehicle. Ownership the defendant could not properly explain, and that the Detective went to the car and looked in it (118-119).

Sgt. Horan testified concerning the Suffolk County Police Department's rules and procedures dealing with impounded vehicles and stated that every piece of equipment in such impounded vehicle must be removed and inventoried pursuant thereto (119). Further, that the 1961 Oldsmobile driven by the defendant was impounded and that the Sgt. inventoried its contents. He took a small tool box out and brought it into the vestibule of the Third Squad and opened it. Among other things found therein was a name, address and telephone number of a person other than the defendant (112, 119). The phone number was dialed and it was determined that it was the number of one Mr. Tyman, a mechanic at the Holy Rood Cemetery in Westbury, Nassau County (120). The contents of the vehicle were removed with the assistance of about eight or nine detectives (120). A battery charger and a wheel balancer were found in the rear of the car underneath the tool boxes in the front of the seat where a passenger's feet would be placed (129-130). The tool boxes were resting on the bolt cutters (132).

The inventory took approximately two hours to complete under the supervision of Sgt. Horan (166). The inventory list occupied two or three pieces of paper with each item given a number and a description (167). Once the handwritten sheets were prepared, they were typed up (168).

PATROLMAN VINCENT FALLICA, of the Suffolk County Police Department, testified that he was on a tour of duty on April 3, 1972, with Sergeant Horan. He recited a factual pattern similar in detail to his brother officer's testimony. He observed the vehicle in question traveling at a high rate of speed with its rear weighted down (207, 209). The license and registration of the defendant were presented to Officer Horan in Ptl. Fallica's presence. After a license check, Horan placed the defendant under arrest for possession of a fraudulent license (211).

Fallica heard Horan advise the defendant of his rights. The conversation with respect to the identity of the passenger was repeated.

Patrolman Fallica drove the defendant's auto to the precinct and stated that the tool boxes in the back seat of the car were piled very high, so high in fact that he couldn't see out of the rear view mirror and had to look out the side (215, 242). He parked the car by the detective building where the detectives impounded it (216). The witness then described the inventory that followed (217). He also indicated that he found an empty bottle of liquor on the front floor of the passenger's side of the auto (221). No attempt was made to lift any of the tools or tool boxes at the diner (243). No boxes were removed until the auto in question was parked in front of the detective's building (243-246).

DETECTIVE GERARD GOZALOFF, currently of the Suffolk County Homicide Squad, testified that on April 3, 1972, he was assigned to the Third Squad Detectives and that he first came into contact with the defendant in the detective's office that evening (261).

Sergeant Horan informed him that he believed that he had the name of the owner of one of the tool boxes (263). Telephone calls were then made to the owner of the box.

Prior to speaking with the defendant, the Detective administered the *Miranda* warnings. The defendant reiterated that he got the tools from "some guy" in Mineola who offered to pay the defendant if he would transport him to Suffolk (265, 283). The defendant stated that he knew the tools were "hot," i.e. stolen (265). He denied ever working or ever living near the Holy Rood Cemetery (266).

The Detective testified with respect to his familiarity with the rules and regulations of the Suffolk County Police Department with reference to cars that are impounded and with the articles found in such cars (272-273).

DETECTIVE JOHN LEAHY of the Third Squad of the Nassau County Police Department testified that he went to the Holy Rood Cemetery in Westbury pursuant to notification by the Suffolk County Detectives that they had recovered tools which were the proceeds of a burglary at that cemetery (312-313).

After arriving at the cemetery the Detective met a Mr. Arnold Woodbury, the supervisor of the cemetery (313). The Detective observed a wide open window at approximately ten minutes before midnight (314). The Detective also met Mr. Tyman at that location (318).

Detective Leahy testified that he dusted the point of entry, the glass area and metal frame for latent fingerprints (319). He stated that the window was pried open apparently with a screwdriver or other tool (319). Four finger prints were lifted, two of which were identifiable and two of which were partial (319). As a result of a heavy rain the remainder of the prints were destroyed (320). The

comparison between the identifiable prints obtained and those of defendant proved negative.

The Detective observed a table placed just below the window which contained a few partial footprints (321). He also observed an empty bottle of liquor, Dewars, on the floor which was dusted for fingerprints but proved negative (322).

The Detective then traveled to the Third Squad in Suffolk and interviewed the defendant after advising him of his constitutional rights (323-324). The defendant basically repeated the same story he had told to the other law enforcement officers with some variations (325-328). The Detective had the Third Precinct in Nassau dispatch a patrol car to the location described by the defendant to search for the defendant's friend's allegedly broken down vehicle, to no avail (328-329). A check was made of all persons in Nassau County with the name of the alleged passenger in the car, also to no avail (330).

The Detective invoiced the bolt cutters and a padlock from a gate which is locked after the premises are secured by the employees (334-336). The lock was in two pieces, apparently having been cut by some sharp instrument (335). The Scientific Investigation Bureau's report of the physical evidence revealed that metal fragments removed from the cutting edges of the bolt cutters and metal fragments removed from the shackle were consistent (338-339).

The defendant told the Detective that he had lived in the Westbury area in prior years when he was a teenager (339).

DETECTIVE JOHN DABROWSKI, of the Third Squad Nassau County Police Department, testified that on April 4th, at approximately 1:30 a.m., he was assigned to look for

a red Pontiac in the area of Westbury where the defendant's friend's vehicle had allegedly broken down (384). This search was fruitless (384-385).

JAMES W. TYMAN, a foreman at the Holy Rood Cemetery in Westbury, left work at 4:30 p.m. on April 3, 1972 (404). He stated that he uses tools in connection with his employment and that those tools are kept in the work area in the shop (404). He identified a photograph of the proceeds of the burglary as being his tools (406). He stated further that his name was on a pill box inside the tool box (407).

After receiving a telephone call from the Suffolk County Police Department he called his formen, a Mr. Woodbury, and they met at the cemetery. He observed that the window in question was opened and the lock broken off (410). On April 3rd when Mr. Tyman left work the window was closed and locked with a bolt (411).

Mr. Tyman noticed that his tools and those of his co-worker were missing (413). He also saw an empty bottle of scotch which had been almost full earlier in the day when the shop was closed (413-414).

Mr. Tyman reclaimed his tools, the value of which was over Five Hundred (\$500.00) Dollars from the Suffolk County Police Department and stated that he had not given anyone permission to take them, nor had he given anyone permission to enter the cemetery, garage or warehouse (414-415). Tyman identified the other tool boxes as belonging to Messrs. Ohlau, Sullo and Gleason, his co-workers at the cemetery (417).

Tyman testified that in his opinion the bolt cutters found in the car were capable of cutting the bolt in question (421-424).

WILLIAM F. OHLAU testified that he was a journeyman mechanic at the Holy Rood Cemetery on April 3, 1972, and that he left his tools locked up in the garage on cemetery premises (442-443). When he returned the following day he noticed that his tools and those of his co-workers were missing (444). He saw the tools again on the following day at the Police Station (446). Mr. Ohlau's tools were worth approximately Two Thousand (\$2,000.00) Dollars (451). He gave no one permission to take those tools from the cemetery nor enter the cemetery on April 3, 1972 (452), nor did he recognize the defendant (453).

JOSEPH CARDELLA testified that in April, 1972, he was a mechanic at the Holy Rood Cemetery and that he left his tools in the garage at the end of that day and that he noticed they were missing on April 4th (461-463). He recovered his tools from the Suffolk Detectives. He gave no one permission to take his tools, worth approximately Four Hundred Fifty (\$450.00) Dollars on that date nor did he give anyone permission to enter the cemetery (467-468). He, too, did not know the defendant (468).

ROY SULLO, a mechanic at the cemetery, kept his tools in the maintenance shop and discovered on April 4th that they were missing (476-479). He gave no one permission to take the tools, worth Seven Hundred (\$700.00) Dollars or go into the shop (480).

ARNOLD WOODBURY was a supervisor in charge of maintenance in the repair shop at the Holy Rood Cemetery on April 3, 1972 (490). He testified that the doors and windows were closed and locked on that date at the end of the working day and that he personally attended to that detail (491-492).

He was able to recognize the proceeds of the burglary as belonging to his employees in part and being the prop-

erty of the cemetery in part, and stated that the tools were in the shop immediately prior to the burglary (492).

Later on in the evening he received a call from his foreman, Mr. Tyman, and went immediately to the cemetery where he noticed the back gate, window and door open (494). Upon inspection of the shop he observed the cabinets open and tools missing (495). The value of the battery charger and wheel balancer owned by the cemetery was approximately Six Hundred Twenty-five to Six Hundred Fifty (\$625.00-\$650.00) Dollars. He gave no one permission to enter the cemetery nor to remove any property therein (497). He, too, did not know the defendant (497). A nearly full bottle of scotch had been consumed and left by the desk. All cabinets had been opened with their locks broken (498). He subsequently redeemed the proceeds from the Suffolk County Police (501). The bolt cutters in question which cut the gate's padlock were not owned by the cemetery. He found a pair of gloves that he did not recognize (498).

JOSEPH CARDELLA, recalled to the stand, testified that the bolt cutters owned by the cemetery had straight jaws whereas the one found in defendant's auto had curved jaws and lacked the cemetery's markings on them (528). He testified he had spoken to the prosecutor during the hiatus in his testimony but that when he initially looked at the cutter he didn't observe the shape of their jaws (529-530).

WASYL HORYN, in charge of the gravedigger's department at Holy Rood, locked the gates of the cemetery on the date in question (531-532).

SERGEANT HORAN, recalled to the stand for further cross-examination, testified that there was apparently an

error in an information he swore to in Suffolk County. In particular, he stated that the information contained a license number commencing with the letter "B", when in fact it should have been a motorist identification number commencing with the letter "C". Sgt. Horan recalled that he hadn't read the information carefully and had assumed that it had correctly shown the number to begin with "C" (537-540). He also stated that there are three checks on a license which can be made in the field to determine if it is a forgery. The first check is the letter commencing the number, which should correspond to the first letter of the owner's last name. The second check is that the second two numbers after the letter should correspond to the second letter of the owner's last name. In this case, in order for the number to correspond to the name Brooks, it would have to read B18 and not B2, as it did when defendant gave it to him. The third check is a birth date check built into the license number. The number given by the defendant also failed the birth date check (544-546).

The Defense

Defendant offered no evidence in his own behalf.

POINT II

The evidence was sufficient as a matter of law to establish defendant guilty beyond a reasonable doubt. (Answering defendant's brief, Points III and IV, pp. 42-50).

Defendant contends on this appeal that the People failed to prove his guilt beyond a reasonable doubt. That is, he argues that the People's proof was insufficient as a matter of law, in that the proof was circumstantial in nature, and that the court below erroneously denied his motion to dismiss the indictment and further improperly charged the jury that it could draw an inference of guilt from the recent and unexplained possession of stolen property. In response, we submit that the People proved defendant's guilt beyond a reasonable doubt and that the facts as established at the trial properly led to the court's charge regarding an inference of guilt.

Preliminarily we note that defense counsel at trial failed to lodge any exception to that portion of the charge to the jury complained of now. As such, the failure to register a protest to the charge acts as a waiver to appellate review of the issue [Crim. Proc. Law § 470.05(2)].

However, if this Court were to review the issue raised by defendant even in the absence of an exception to the charge, the People submit that the evidence at trial clearly supports a finding of guilt of the crime of burglary.

Defendant contends that the proof established at trial did not lead to an inference of guilt. Specifically, he points to the factors which the court noted in its charge as possibly leading to the application of the inference of guilt (Charge, 608). These factors, defendant argues, did not so lead. Our review of the evidence, as briefly outlined *infra*, indicates that in fact each of the items now mentioned by Butler properly led to a finding of guilt.

The case at bar is primarily concerned with the issue of the applicability of the rule established by this Court in *Knickerbocker v. People*, 43 N.Y. 177 (1870), which permits an inference of guilt to be drawn from the recent and unexplained possession of stolen property. In effect, this Court held that when a party is found in exclusive possession of the fruits of a theft, shortly after its commission, and his possession is either falsely explained or unexplained, the trial court may properly charge that the jury may draw an inference of a defendant's guilt of the crime committed. It was further held that the *Knickerbocker* rule will not be automatically applied, for there are circumstances in which other facts may neutralize or repel the inference, whereupon such inference should not properly be charged. The applicability of the inference will depend on the facts of the individual case (*People v. Galbo*, 218 N.Y.

283, 290-291 [1916]; *People v. Colon*, 28 N.Y. 2d 1 [1971]). A rule similar to the one established in *Knickerbocker* has recently been held to be not violative of due process (see *Barnes v. United States*, 412 U.S. 837 [1973]).

Butler argues on this appeal that the quantum of evidence set forth by the People was insufficient for the inference of guilt to have properly been drawn and that it was error for the court below to have so charged. We disagree.

In our view, the testimony at trial clearly established that defendant was one of the burglars. Many facts lead us to this conclusion, shared by the appellate tribunal. First, we must consider the weight of the tools stolen from the cemetery. There was testimony at trial that not only was the car completely filled with stolen items, but, in addition, that the individual boxes were very heavy, two of which weighing from two hundred to three hundred pounds apiece. Given such fact, one could properly draw the inference that more than one person must have stolen the items and loaded them in the vehicle. So numerous were these items that it took approximately eleven detectives several hours to remove the tools. To this, Butler argues that the largest boxes consisted of several tiers of drawers and that one person, "Callahan," a man of average build, could have moved each one individually. In response, we submit that such facts, the weight of the tools and Callahan's size, were brought before the jury and obviously they rejected the possibility that Callahan alone could have stolen the tools. In that regard, we note in passing that counsel at trial never refuted the People's contention that more than one person had to have been involved in the burglary. On the contrary, it was his stance that "Callahan," who had fled from the car when the police approached it, must have had an accomplice other than defendant (Defense Summation, pp. 564-565).

The second factor leading to the proper drawing of the inference of guilt was the time element involved. The burglary had occurred at approximately 5:30 p.m. in Nassau County and Butler was apprehended with the tools in his car at approximately 11:00 p.m. in Suffolk County, several miles away from the cemetery. It seems incredible to us that a single burglar could have stolen the tools from the warehouse, loaded them into one vehicle, met the defendant and then transferred the tools to defendant's car. There simply was not enough time to do all of this. Moreover, the fact that the car was filled literally to the top indicated that the size of defendant's car, and not some other vehicle, determined the amount of tools taken. The time factor and the amount taken in particular, in our view, negated a finding of innocence.

In addition, defendant had acknowledged to the police that he had been in the vicinity of the cemetery earlier that evening. Moreover, when asked about the stolen tools, defendant offered three different explanations to four police officers—one to Sgt. Horan and P.O. Fallicia, a second to Det. Gozaloff, and a third to Det. Leahy. He also admitted that he knew the tools were "hot." Surely such false explanations, combined with the acknowledgement that the tools were stolen, fit within the ambit of the *Knickerbocker* rule.

Another factor considered by the appellate court in upholding the propriety of the trial court's charge was the presence of the bolt cutters in Butler's car. The report of the Scientific Investigation Bureau stated unequivocally that the fragments of metal taken therefrom were consistent with the fragments of metal on the hasp of the lock removed from the rear gate of the cemetery, which had been cut during the course of the burglary. Additionally, these bolt cutters were found behind the driver's seat, covered

over by the stolen property. The location of these cutters was consistent with the theory that the defendant and another cut the gate lock, tossed the bolt cutters onto the floor of the back seat, drove into the cemetery and loaded the stolen items on top of the cutters. If Butler's claim that he had met "Callahan" and transferred the items to his car were true, the bolt cutters would probably not have been located where they were, under the stolen goods.

Defendant claims that none of these factors led to an inference of guilt. It is his position that the factors enumerated above were consistent with a finding of innocence. He argues that the police did not sufficiently investigate the case and that had they done so, "Callahan" would have been located. In response, we note that the record is replete with evidence of the investigation that the police had conducted. To check out Butler's story, Det. Dabrowski testified that he went to Westbury at approximately 1:30 a.m. on April 4th to locate "Callahan's" red Pontiac, which allegedly had broken down, but the car was never located (Dabrowski, 384-386). In addition, while a few fingerprints were discovered at the cemetery, given the misty, rainy weather, most of the prints had been destroyed (Leahy, 319-320). Gloves were also found in the shop, thus indicating one of the burglars had worn them to avoid detection of his fingerprints (Woodbury, 498). The police dusted a scotch bottle found in the warehouse for prints as well, but there were no fingerprints on it (Leahy, 321-322). Given all the aforementioned steps taken by the police, we cannot agree with Butler's contention that the police's investigation was insufficient and that he was the victim of overzealous prosecution. Indeed, the facts indicate, to the contrary, that in actuality the police had attempted to locate the red vehicle defendant had maintained "Callahan" had driven within two and one-half hours after Butler had

been apprehended, and had dusted for fingerprints at the warehouse, both to no avail. It seems clear to us that defendant's version of the events was belied by his own statements and the police's subsequent investigation. Of course, Butler's claim that "Callahan," and not he, had been the burglar was amply presented at trial and was apparently disbelieved by the jury. As such, an appellate court will not substitute its judgment for the manner in which the triers-of-fact have determined credibility (see, e.g. *People v. Regina*, 19 N.Y. 2d 65 [1966]; *People v. White*, 2 N.Y. 2d 220 [1957]; *People v. Tait*, 234 A.D. 433, 438 [1st Dept.], *aff'd* 230 N.Y. 629 [1921]).

We note in passing, defendant's reliance upon the fact that Butler failed to flee. However, he ignores the fact that the officers immediately approached him and made flight impossible.

It is our position, then, that the testimony demonstrated conclusively that all the facts relied upon, taken together, logically compelled the court to charge that an inference of guilt could be drawn. Moreover, it is apparent that there was sufficient circumstantial evidence to support the jury's finding of guilt. In that regard, the law is clear that a finding of guilt may be based solely upon circumstantial evidence. The rule delineating the requirements for such a verdict has been restated succinctly in an opinion by Judge Bergan of this Court in *People v. Wachowicz*, 22 N.Y. 2d 369 (1968):

The rule governing the sufficiency of circumstantial evidence as this Court has restated it many times is: (a) that the hypothesis of guilt should flow naturally from the facts proved, and be consistent with them all; (b) the facts proved must all be consistent with guilt and inconsistent with innocence and exclude

to a moral certainty every hypothesis but guilt (e.g. *People v. Bennett*, 49 N.Y. 137, 144; *People v. Harris*, 136 N.Y. 423; *People v. Razezicz*, 206 N.Y. 249; *People v. Woltering*, 275 N.Y. 51, 61; *People v. Eckert*, 2 N.Y. 2d 126)....

In the end, it is a question of whether human experience would lead a reasonable man, putting his mind to it, to reject or accept the inferences asserted for the established facts. (*People v. Wachowicz*, *supra*, at 372.)

Taking note of the vast diversity of results in cases which involve the rules governing the sufficiency of circumstantial evidence, this Court further stated:

. . . sometimes circumstantial proof has been held sufficient; sometimes insufficient . . . the concurrently decided case of *People v. Cleague*, 22 N.Y. 2d 363, is in the chain of differentiated evaluations in which a majority of the Court is of the opinion the circumstantial proof is not strong enough (*People v. Wachowicz*, *supra* at 372) (Emphasis added).

The Court concluded that the facts in *Wachowicz* led to the proper verdict that the defendant had attempted to break into the tavern.

On the other hand, concurrently with *Wachowicz*, this Court decided *People v. Cleague*, *supra*, wherein it was held that the evidence was insufficient to tie *Cleague* to the burglar who was apparently exiting from a used car office possessed of his loot. In view of the fact that the evidence established that the defendant was merely looking at some used cars in the lot, this Court held that his acts did not "give rise to a strong inference that the defendant played

a culpable role in the commission . . ." of the criminal acts (*People v. Cleague*, *supra* at 364-365).

The dichotomy of *Wachowicz* and *Cleague* once again points out the necessity of considering each case on its entire facts when determining the sufficiency of circumstantial evidence (see *People v. White*, 41 A.D. 2d 629 [1st Dept. 1973]).

In our view, the totality of the circumstances in the instant case compel a finding that defendant had in fact been one of the burglars. In a lengthy opinion, the Appellate Division concurred with our position, holding that the interplay of the various pieces of circumstantial evidence properly gave rise to the application of the inference of guilt of the burglary based upon the recent and unexplained possession of the stolen property (*People v. Butler*, *supra* at 429).

Clearly, the hypothesis of guilt herein flowed naturally from the proven facts. The facts were consistent with guilt, inconsistent with innocence, and excluded to a moral certainty every hypothesis but guilt (*People v. Wachowicz*, *supra* at 372).

While *Butler* relies upon *People v. Galbo*, *supra*, and *People v. Smith*, 39 A.D. 2d 855 (1st Dept. 1972), in support of the proposition that the evidence was insufficient to establish that defendant was one of the burglars, we note that the factual settings were distinctly different to the case at bar. In *Galbo*, the facts were that a legless, crippled man had been charged with having murdered a strong man. This Court found that it was impossible that *Galbo* could have committed the crime charged. In *Smith*, it was established that the defendant was in possession of stolen property, but not that he had committed the burglary, for he

had been legally on the premises as a guest of another tenant. There, the Court held that there was not enough to sustain the inference of guilt.

Butler, however, ignores another case involving the application of the *Knickerbocker* rule, *People v. Ramos* (34 A.D. 2d 1019 [2d Dept. 1970], *aff'd* 28 N.Y. 2d 604 [1971]), wherein this Court affirmed a burglary conviction of a defendant who had descended the stoop of a building alongside his co-defendant who was carrying a stolen television set. It may be seen from the brief exposition of facts that the quantum of proof against Ramos was substantially less than that existing in the instant case and yet his conviction was upheld.

In conclusion, then, it is our position that, given the overwhelming circumstantial evidence in the case at bar, the court below properly denied defendant's motion to dismiss the indictment, correctly instructed the jury concerning the inference of guilt, and that defendant's guilt of the crime of burglary was established beyond a reasonable doubt.

POINT III

Defendant was not placed twice in jeopardy. (Answering defendant's brief, Point V, pp. 51-55).

On this appeal, Butler claims that the prosecution of the instant burglary case in Nassau County, after he had been previously convicted in Suffolk County of possessing stolen property, violated the principle that a defendant may not be twice prosecuted for the same offense. We find, however, that defendant was properly convicted in Nassau County and that he was not placed in double jeopardy thereby.

It may be recalled that the burglary in question here occurred on April 3, 1972, in Nassau County. Butler was apprehended later that same night in Suffolk County as he was driving along, carrying a quantity of stolen tools. The following day, April 4, 1972, defendant was charged in Suffolk County with the crimes of Criminal Possession of Stolen Property in the Second Degree and Possession of a Forged Instrument. Less than two weeks later, on April 17, 1972, defendant pleaded guilty before the Hon. John Copertino, Judge of the District Court, Suffolk County, to the amended information charging him with Criminal Possession of Stolen Property in the Third Degree, a Class A misdemeanor, and Possession of a Forged License, a violation under the Vehicle and Traffic Law. On May 19, 1972, the Hon. Alexander W. Kreamer sentenced defendant to a term of one year on the Possession of Stolen Property charge and thirty days on the Forged License charge, sentences to run concurrently (Minutes of Trial, pp. 290-291, 294-295, 300-301).

Subsequently, on August 17, 1972, Butler was arraigned in Nassau County District Court for the burglary. On November 9, 1972, the Nassau County Grand Jury indicted him for the crimes of Burglary in the Third Degree and Grand Larceny in the Second Degree. On December 13, 1972, defendant moved to dismiss the indictment (see Defense Appendix b-1). The People submitted responding papers in opposition on December 20, 1972 (see Defense Appendix c-1). On February 21, 1973, the court granted defendant's motion to dismiss the grand larceny count, but denied the motion as to the burglary count (see Defense Appendix d-1). Butler went to trial on April 24, 1973, and was found guilty of Burglary in the Third Degree. Defendant was sentenced subsequently to an indeterminate term of imprisonment not to exceed five years.

It is now defendant's content on that the prosecution of defendant in Nassau County on the charge of burglary was violative of his privilege against double jeopardy under Criminal Procedure Law § 40.40. In response, we submit that the pertinent claim of error was waived at the trial level and, in the alternative, that the verdict below for burglary did not violate § 40.40.

The issue now before this Court has never been raised previously in any other tribunal. It is clear that counsel did not raise a claim of double jeopardy at the Appellate Division, nor did he raise it initially at the hearing for an application for leave to appeal to this Court. However, the double jeopardy claim was separately raised subsequently and this Court then granted leave. In our view, not only was the alleged violation of double jeopardy not claimed in the lower appellate tribunal, but was not sufficiently raised at the trial level to preserve it for appellate review.

As we have previously noted, prior to the commencement of the instant trial, defense counsel made a motion to dismiss the indictment. In particular, counsel first moved to dismiss the Grand Larceny count under Criminal Procedure Law § 40.20 on the ground that since defendant had been previously convicted of Criminal Possession of Stolen Property in Suffolk County and since, under Penal Law § 165.60 a person may not be convicted of both larceny and possessing stolen property, the Grand Larceny count had to be dismissed. The People consented to the dismissal of that count on the grounds of the prohibition set forth in Penal Law § 165.60 and C.P.L. § 40.20. The court granted that portion of the motion.

Counsel next moved for an order to dismiss the burglary count on the ground that if the larceny count were dismissed, the burglary count must also fall because there

would be legally insufficient evidence to convict Butler of burglary in the absence of proof of the larceny. Counsel cited once again C.P.L. § 40.20 for the proposition that defendant could not be twice prosecuted for the same offense. The People opposed defendant's motion as to the burglary count.

The trial court then denied defendant's motion to dismiss the charge of burglary, stating that the absence of the larceny count did not mandate a dismissal of the burglary charge. The court found that the indictment was legally sufficient.

It is apparent from the foregoing that at no time in its motion to dismiss did defense counsel ever raise a challenge to the indictment under C.P.L. § 40.40. Instead, the challenge was addressed to a claim of strict double jeopardy under § 40.20 and to an allegation as to whether substantively the crime of burglary could be made out without the charge of larceny. The court having previously granted defendant's application as to the larceny count under the statutory mandates, properly found that there was no violation of § 40.20 present as to the larceny count, nor was there any merit to the substantive issue raised.

Given the fact that no claim under § 40.40 was raised below, in our view defendant has waived his right to challenge it now on appeal. Butler asked the trial court to dismiss the burglary charge under the § 40.20 double jeopardy statute. The court properly found no such violation for it was clear from the facts that defendant was not being twice prosecuted for the same offense. Burglary and possessing stolen property are two distinct crimes. As such, the exception set forth in C.P.L. § 40.20(2)(a) was applicable, for it was clear that there was no bar to prosecution of the burglary charge, in that the elements of the

charge previously pled to in Suffolk County were distinguishable from the elements of the charge of burglary.

Thus, we submit that, in the absence of a motion to dismiss pursuant to C.P.L. § 40.40, Butler has waived objection thereto on appellate review. Criminal Procedure Law § 470.05 clearly provides that for purposes of appeal, a question of law with respect to a ruling is presented when a protest thereto was registered at the proceedings below. The absence of a timely challenge acts as a waiver thereof. In view of counsel's failure to move to dismiss the burglary charge under § 40.40, the court was unable to rule on that issue. In the absence of the proper motion by Butler prior to trial, he cannot now challenge a ruling by the court on another question. Hence, we submit that defendant has waived his objection for appellate review.

Turning to the so-called merits of Butler's claim, it is necessary to briefly analyze the statute under which he contends that the Nassau County burglary prosecution should have been barred.

As we have previously noted, it is clear that C.P.L. § 40.20, concerning a strict double jeopardy prohibition, is inapplicable to the case at bar. It is defendant's contention that, although he moved under § 40.20 at the trial level, this Court should now rule that the Nassau County prosecution was violative of C.P.L. § 40.40. We disagree.

Section 40.40 provides in part:

Separate prosecution of jointly prosecutable offenses; when barred

1. Where two or more offenses are joinable in a single accusatory instrument against a person by reason of being based upon the same criminal transaction, pursuant to paragraph (a) of subdivision

two of section 200.20, such person may not, under circumstances prescribed in this section, be separately prosecuted for such offenses even though such separate prosecutions are not otherwise barred by any other section of this article.

2. When (a) one of two or more joinable offenses of the kind specified in subdivision one is charged in an accusatory instrument, and (b) another is not charged therein, or in any other accusatory instrument filed in the same court, despite possession by the people of evidence legally sufficient to support a conviction of the defendant for such uncharged offense, and (c) either a trial of the existing accusatory instrument is commenced or the action thereon is disposed of by a plea of guilty, any subsequent prosecution for the uncharged offenses is thereby barred.

This provision derives its genus essentially from the rule established in *Ashe v. Swenson*, 397 U.S. 436 (1970), in which the Court barred successive prosecutions arising from a single criminal transaction wherein the first trial resulted in an acquittal. In an attempt to answer some unresolved problems arising from *Ashe*, the legislature enacted § 40.40. The purpose of the statute was to implement a "policy of avoiding harassment of the individual by successive prosecution" in circumstances where a second prosecution was not strictly in violation of the prohibition against double jeopardy (*People v. Fernandez*, 43 A.D. 2d 83, 91 [2d Dept. 1973]; *People v. Rudd*, 41 A.D. 2d 875 [3d Dept. 1973]).

It is evident from a careful reading of the pertinent statute that the legislature intended that this section apply to prosecutions arising within one jurisdiction. Indeed,

subsection 2 clearly refers to a bar to prosecution wherein two or more offenses could have been joined in a single accusatory instrument and where one is not so joined in that instrument or another instrument *filed in the same court*. The failure to charge defendant with all the offenses, "despite possession by the People of evidence legally sufficient to support a conviction of the defendant for such uncharged offense," and the commencement of the trial on the existing instrument or disposition by plea acts as a bar to future prosecution of the uncharged offense.

Since it is apparent that the legislature was referring to the joinder of offenses in a single jurisdiction, the issue then becomes whether either of the two counties involved, *i.e.*, Nassau and Suffolk, could have charged and convicted Butler of both burglary and possession of stolen property. We submit that neither could have.

We shall first deal with Suffolk County's ability to prosecute. Defendant argues that Suffolk could have convicted defendant of burglary on the theory that under the *Knickerbocker* rule, the possession of stolen property would have been legally sufficient evidence to support a conviction for the Nassau County burglary. However, we find that defendant is completely misinterpreting the import of *Knickerbocker*. A review of that case reveals that the *Knickerbocker* rule is a rule of evidence and cannot be used as a jurisdictional predicate. *Knickerbocker* provided for an inference of guilt of commission of a crime to be drawn based upon a defendant's unexplained possession of the fruits of the crime. Application of the inference in a case does not constitute an element of the crime. It is merely a rule of evidence to be applied at a trial of a crime over which the particular trial court has jurisdiction.

In that regard, Criminal Procedure Law § 20.40(1) provides that a criminal court will have jurisdiction over an offense wherein the conduct occurring within its county was sufficient to establish an element of the offense. It is clear that the burglary occurred in Nassau, and not Suffolk County. No element of the burglary was committed in Suffolk County. The only activity which arguably occurred in Suffolk was defendant's possession of the stolen tools, such possession not constituting an element of the crime of burglary. We therefore submit that, since the burglary was not committed in Suffolk County and since the *Knickerbocker* rule cannot be construed to provide the necessary jurisdictional nexus, the Suffolk County authorities could not have successfully prosecuted Butler for the burglary. Such being the case, it is clear that defendant's claim of a violation of C.P.L. § 40.40 as far as Suffolk County is concerned is spurious.

The issue now becomes whether Nassau County could have successfully prosecuted Butler for both criminal possession of stolen property and burglary and whether the failure to do so violated C.P.L. § 40.40. We submit that it could not.

The law is well settled that a person who has been found guilty of being a burglar-thief may not also be properly convicted of being a possessor-receiver of the stolen property. This is so because the receiver ordinarily has no part in the burglary. Moreover, the criminal act of knowingly receiving stolen property generally occurs independently of the burglary and at a time subsequent to the completion of the crimes of burglary and larceny. Thus, it has long been the rule that a thief cannot receive from himself (*People v. Daghita*, 301 N.Y. 223 [1950]; *People v. Marino*, 271 N.Y. 317 [1936]; *People v. Spivak*, 237 N.Y. 460 [1924]).

Such being the case, once it was apparent that Butler was in fact the burglar-thief and not merely the possessor-receiver, Nassau County would have been obliged to choose upon which theory to prosecute since it was clear from the facts that developed, i.e., the false explanations by defendant, the weight and quantity of the stolen tools, the presence of the bolt cutters in the car, the time factor, and so forth, that Butler had been one of the burglars, the People could not have successfully also prosecuted him for the possession of the goods. While the Nassau County Grand Jury could have indicted defendant for both offenses, a jury could not have properly found him guilty of both. And, in that regard C.P.L. § 40.40(2) sets forth a bar to second prosecution only where the charges were joinable and the People had evidence legally sufficient to support a conviction of the defendant for the uncharged offense. Thus, since defendant could not have been convicted of both burglary and criminal possession of stolen property, Nassau County's failure to charge him with both in the same indictment does not act as a bar to the burglary prosecution.

We note in passing that the very purpose of § 40.40 was to avoid a policy of harassment of a defendant by successive trials. Here, Butler pleaded guilty within two weeks after arraignment in Suffolk County. That plea was to a reduced charge of a misdemeanor for which he received a one-year sentence. There is no indication that the authorities in Nassau County, being faced with a previous plea in Suffolk County to another charge, intended to harass Butler by successive prosecutions. In point of fact, he actually participated only in one trial.

Parenthetically, we note that it may be that, given the obvious fact that Butler was the actual burglar and not merely the receiver of the stolen goods, Suffolk County

could not properly have convicted him of possession of stolen property. We make this comment in light of our reading of the intent of the legislature in enacting the statutes concerning the possession of stolen property (Penal Law §§ 165.40-165.50). In our view, it was apparent that the legislature intended to proscribe conduct wherein a defendant is apprehended in possession of stolen property, but where it cannot be proved that he was the actual thief.

The present Penal Law provisions were derived from former Penal Law §1308 which dealt with the "buying, receiving, concealing or withholding" of stolen property. The statutory language was subsequently altered in the 1967 revision to provide for intentional possession of stolen items, in an attempt to clarify the meaning of the earlier statute (see McKinney's Commentaries, §165.40, pp. 516-518). However, in altering the language, in our view, it was not the intention of the legislature to change the basic premise—that being that the person charged under these provisions not be the actual thief. Thus, it seems evident to us, that Butler could not have been properly convicted of criminal possession of stolen property in either county. We further, note, however, that no motion was made in Suffolk County to dismiss the information on this ground, although all present were aware of the existence of the pending Nassau burglary case. Therefore, such failure constituted a waiver to a claim of error on appellate review of the Suffolk County conviction.

In sum, it is our position that Butler has waived his right to challenge his Nassau County burglary conviction on the ground of a violation of C.P.L. § 40.40. Or, in the alternative, we submit that since defendant could not have been convicted in either Suffolk or Nassau Counties of both burglary and criminal possession of stolen property, Sec-

tion 40.40 is wholly inapplicable, and that defendant was properly convicted in Nassau County for the crime of burglary.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully Submitted,

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